No. 546

Supreme Court of the United States

OCTOBER TERM, 1920

MAX W. STOEHR
Appellant

against

JAMES N. WALLACE and others
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND ARGUMENT FOR APPELLEES:

BOTANY WORSTED MILLS AND
DIRECTORS OF BOTANY WORSTED MILLS
STOEHR & SONS, INC. AND
DIRECTORS OF STOEHR & SONS, INC.

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SUBJECT INDEX

Cases Cited

Text Books, Treaties, Acts, Authorities

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AGAINST

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This is an appeal by the complainant from the final decree of the District Court of the United States for the Southern District of New York entered May 13, 1920 (Transcript page 327; folios 561-563), dismissing upon the merits the original and supplemental bills of complaint (page 319; folios 547-547½).

The summary of the facts in the appellant's brief omits many vital and essential facts—many of the facts which were held by Judge Hand in his opinion to be decisive of the case. The omission of those facts is startling. It omits scores of facts that, when analyzed in their true relation to the *other record facts*, are fatal to the appellant's case.

The summary of facts contains no reference whatever to the crucial Heyn & Covington letter of February 9, 1918, a letter which, without almost any other evidence, is decisive of the case against the complainant. It also omits all reference to the official approval of that letter by Hans E. Stoehr. It makes no reference to the detailed letter, with its enclosures, of Hans E. Stoehr written from Passaic, New Jersey, February 5, 1918, to Heyn who was then in Washington (page 161; folio 311; defendants' Exhibit X, page 244; folios 447-448). It makes no reference to the second letter of Hans E. Stoehr written from 200 Fifth Avenue, New York City, February 5, 1918, to Heyn in Washington (defendants' Exhibit H, page 224; folio 425). Those three letters were among the most, if they were not *the* most, decisive exhibits in the case. They were so regarded by Judge Hand, as his analysis of them in his opinion shows. No reference whatever was made to them in the summary of the facts preceding the law points of the appellant's brief.

Those and many other astounding omissions make it necessary that the real facts—*all* of the relevant facts—be stated in this brief in their true order and right perspective.

Appellant's counsel repeatedly seeks to draw misleading deductions from even the few relevant facts that his brief contains. Almost the very first sentence in his statement of facts (brief, page 2) is a misstatement, namely: *"The material facts are practically admitted"*.

It is not going too far to say that the deliberate omission from the summary of facts of the decisive and vital Heyn & Covington letter and of the two decisive and vital letters of Hans E. Stoehr to Heyn in Washington, makes that statement a travesty of the facts.

The industry of counsel for the appellant is well known. If the facts—*all* the facts—were in favor of the appellant's contention, we may be quite sure that they would *all* have been stated in his brief. But when the facts are so overwhelmingly against the complainant as they are here, it is little wonder that his counsel dwells at great length, dwells exhaustively, on what he contends to be the law, and thus labors to get away—*far* away, as far away as possible—from the facts.

The statement of the facts by counsel for the appellant is designed to give the impression that the case involves merely the construction of a written contract. But the most important evidence revealed the facts and circumstances leading up to the contract and to its execution and of course not appearing upon the face of the contract. Those facts all bear upon the vital question in the case, namely, the true intent of the parties and whether in fact THE PERSONS SIGNING THE PAPER INTENDED TO MAKE ANY CONTRACT AT ALL. That those facts were important and controlling is shown by Judge Hand's opinion, which, aside from the constitutional points considered by him, was based upon those facts and not upon the construction or interpretation of the pretended contract.

The following statement gives *all* the relevant facts, and yet most of them are not even alluded to by counsel for the complainant in his statement of facts.

Following our statement of the facts, we will point out a few of the misstatements of fact made by counsel for the appellant. Then will follow a brief summary of Judge Hand's opinion, the basis of which was misstated in the brief of counsel for the appellant. Then will come the discussion of the points of law.

The Corporations and the Persons Involved

Kammgarnspinnerei Stoehr & Co., Actiengesellschaft

This is a corporation of Leipzig, Germany, with a share capital of 12,000,000 marks (page 119; folio 232).

Its stock is dealt in on the stock exchanges of Leipzig and Berlin. Among its stockholders were the complainant, Max W. Stoehr, who claimed that he had owned 600,000 marks of its stock (page 119; folio 232); his brother Georg Stoehr, who, Max W. Stoehr asserted, had owned between 1,500,000 and 2,000,000 marks of its stock, and Hans E. Stoehr who was said to have owned about one million marks of its share capital (pages 124-125; folios 240-241). Max W. Stoehr testified that he did not know the stock holdings of his father, Eduard Stoehr, in the corporation (pages 124-125; folios 240-241).

The officers of the Leipzig corporation were: Two "directors", either one of whom might sign and act alone, and so-called *procuristen*, two of whom were bound to sign together or one *procuristen* with one of the two directors (Max W. Stoehr, page 124; folio 241; Ferdinand Kuhn, page 166; folio 319). The committee of the company was known as the aufsichstrat, which corresponds to an American executive committee (Max W. Stoehr, pages 124-125; folios 241-242; Ferdinand Kuhn, page 166; folio 319). The aufsichstrat had a chairman and "the exact definition of aufsichstrat is that it is 'the supervising board'" (page 110; folio 212). In February, 1917, the board of directors of Stoehr & Co. consisted of five members: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden and Carl Beckmann (defendants' exhibit F, pages 218-223; folios 417-423).

Botany Worsted Mills

This is a corporation of New Jersey (page 105; folio 201), now with a capital stock of $3,600,000, divided into 36,000 shares of the par value of $100 each (page 105; folio 201).

It manufactures and sells woolen and worsted goods and yarns (page 105; folio 201).

Stoehr & Sons, the partnership

This was a partnership consisting of Eduard Stoehr a German subject, of Leipzig, Germany, and his sons Georg Stoehr, also a German subject, of Leipzig, Germany, Hans E. Stoehr, a German subject, resident at that time in the United States, and the complainant Max W. Stoehr, a former German subject and now a naturalized citizen. The respective partnership interests (defendants' exhibit A, pages 210-214; folios 402-409) were as follows:

Eduard Stoehr	$420,000	(42/56ths)
Hans E. Stoehr	$ 80,000	(8/56ths)
Georg Stoehr	$ 50,000	(5/56ths)
Max W. Stoehr	$ 10,000	(1/56th)
Total	$560,000	

Stoehr & Sons, Inc.

This is a New York corporation, incorporated February 17, 1917. The incorporators were Max W. Stoehr and Georg Roehlig and Alfred de Liagre (relatives of the Stoehrs). Its authorized capital stock of the par value of $250,000, divided into 2,500 shares of $100 each, was issued for all of the assets of the partnership.

The chief personal participants were:

Hans E. Stoehr, a son of Eduard Stoehr of Leipzig, Germany, and who was a German subject then resident in the United States; and the complainant Max W. Stoehr, also a son of Eduard Stoehr, a German by birth and naturalized in 1911 (page 100; folio 193).

The other persons were:

Eduard Stoehr, the father of the other three Stoehrs, a German subject and a resident of Leipzig, Germany, and a member of the aufsichstrat of Kammgarnspinnerei

Stoehr & Company. He had been a nominal director of the Botany (defendants' exhibit V, pages 242-244; folios 445-446).

Georg Stoehr, also a German subject and a resident of Leipzig, Germany, and a nominal director of the Botany Worsted Mills, though residing abroad (defendants' exhibit V, pages 242-244; folios 445-446). He was said by Max W. Stoehr to be also a stockholder of Kammgarnspinnerei Stoehr & Company. He was one "of the two directors" of the Leipzig company in 1917, the other being a Dr. Kuntz (page 119; folio 232). He was not a member of the aufsichstrat (page 119; folio 232). Georg Stoehr arrived in the United States "before Christmas" in 1914, and left about the middle of October 1915 (testimony of Max W. Stoehr, page 120; folio 233).

Georg Roehlig, a cousin of the two Stoehrs, participated in the organization of the New York company. He assisted the two Stoehrs "in perfecting the organization" (Max W. Stoehr, page 120; folio 234).

De Liagre, who took part in the organization and was one of the voting trustees, was also related to the Stoehr family.

Herbert A. Heyn was a member of the law firm of Heyn and Covington. He and his firm were counsel for the Botany company, and also counsel for the two Stoehrs in New York (page 112; folio 216). Heyn had drawn the copartnership agreement of 1913 (page 121; folio 236). He organized the New York company and prepared the contract between it and the Leipzig company, which Hans E. Stoehr in New York pretended to sign for the Leipzig company. Heyn's death occurred April 30, 1918 (page 129; folio 250).

To avoid repetition, we shall refer to the *alleged* contract of February 20, 1917, merely as "the contract".

We shall refer to the Kammgarn Spinnerei Stoehr & Company Actiengesellschaft of Leipzig, either as "the Leipzig corporation" or "the Leipzig company" or as "Stoehr & company" or "Stoehr & co.", the name by which

the Leipzig corporation was usually referred to by the Stoehrs in English.

Stoehr & Sons, Inc. will be referred to for the most part as "the New York company".

The partnership of Stoehr & Sons we sometimes refer to as "Stoehr & Sons" and sometimes as "the partnership".

The 14,900 shares owned by the Leipzig corporation which were the ***nominal*** subject of the contract will be generally referred to as "the shares".

The Botany Worsted Mills of Passaic, New Jersey, will be referred to for short as "the Botany" or "the Botany company".

Before a consideration of the facts, it may be well to recall here the following pertinent historic dates:

January 9, 1917—Announcement by the German government of unrestricted submarine warfare.

February 1, 1917—Unrestricted submarine warfare begun.

February 3, 1917—Diplomatic relations between the United States and Germany broken off.

April 6, 1917—America declared war on Germany.

The following dates of the following acts are pertinent:

October 6, 1917—*The Trading with the Enemy Act* became law.

October 22, 1917—A. Mitchell Palmer appointed Alien Property Custodian and continued as Alien Property Custodian until March 7, 1919.

March 28, 1918—Amendment to *The Trading with the Enemy Act* giving the Alien Property Custodian unconditional and unrestricted power to sell captured property.

November 4, 1918—Amendment to *The Trading with the Enemy Act,* providing for the issuance of new certificates in place of former certificates, not in this country, and in other material respects.

March 7, 1919—Francis P. Garvan became Alien Property Custodian and is still Alien Property Custodian (page 155; folio 300).

Certain Relevant Dates in the Case

February 20, 1917—The *alleged* contract.

February 20, 1917—The placing of the 2980 rubber stamps entries upon the stock record of the Botany.

December 3, 1917—Sworn report by Max W. Stoehr to the Alien Property Custodian as to the voting trust certificates held by him as trustee for Eduard Stoehr (defendants' exhibit Q-1, pages 276-285; folios 490-497).

December 3, 1917—Sworn report by Max W. Stoehr to the Alien Property Custodian as to the voting trust certificate held by him as trustee for Georg Stoehr (defendants' exhibit R-1, pages 285-286; folio 498).

December 6, 1917—Report by Stoehr & Sons, Inc. to Alien Property Custodian, sworn to by Max W. Stoehr as treasurer.

December 11, 1917—Sworn report by Thomas Prehn, president of the Botany, to the Alien Property Custodian.

February 3 to 6, 1918—Heyn's and Lenssen's conferences in Washington.

February 5, 1918—Hans E. Stoehr's two letters from New York to Heyn in Washington.

February 9, 1918—Letter of Heyn & Covington, approved by Hans E. Stoehr as treasurer of the Botany and as president of Stoehr & Sons, Inc., to Alien Property Custodian in Washington.

March 18, 1918—Death of Hans E. Stoehr (page 100; folio 193).

April 5, 1918—Seizure of the 14,900 shares of stock by the Alien Property Custodian.

April 22, 1918—Transfer of the 14,900 shares into the name of the depositary for the Alien Property Custodian.

April 30, 1918—Death of Herbert A. Heyn (page 112; folio 216).

October 10, 1918—Max W. Stoehr's resignation as secretary and director of the Botany.

October 16, 1918—Max W. Stoehr's resignation as secretary and director of Stoehr & Sons Inc.

December 2, 1918—Advertised date of sale of the shares.

The Facts

In the certificate of incorporation of the New York company (paragraph ninth) the subscribers each agreed to take the following shares in the corporation:

Max W. Stoehr	8 shares
Georg G. Roehlig	1 share
Alfred deLiagre	1 share
	—
Total	10 shares

The certificate was sworn to February 15, 1917. On the same day Heyn & Covington mailed the certificate to the secretary of state at Albany. The certificate was received by the secretary of state February 16, 1917; and he acknowledged its receipt and issued the usual certificate that it had been placed upon file and recorded on February 16, 1917, and that the filing fees had been paid. The duplicate original of the certificate of incorporation was filed in the office of the county clerk of New York county on February 17, 1917.

The first meeting of the incorporators was held at 200 Fifth Avenue on February 19, 1917, at 4:30 P. M. (plaintiff's exhibit 2, pages 186-188; folios 352-356). All of the incorporators were present (plaintiff's exhibit 2, pages 186-188; folios 352-356).

A form of by-laws was presented, read article by article, "and unanimously adopted".

Having read the by-laws "article by article" and the same having been unanimously adopted, the 4:30 P. M. meeting of the incorporators (there were as yet no stockholders) then proceeded to business, and the "offer" in the name of the partnership to the New York company bearing date February 19, 1917, was recited, providing that the corporation should issue to the partnership $250,000 of its stock, "full-paid and non-assessable," and assume the debts of the partnership, in consideration of the transfer to the company of "the business mentioned in their written offer

presented to the meeting" (offer and bill of sale; plaintiff's exhibit 3, pages 188-189; folios 357-359). The minutes then recite that the directors were authorized "to purchase said business and to issue said stock in payment thereof" by the incorporators, not yet stockholders (minutes of first meeting of incorporators; plaintiff's exhibit 2, pages 186-188; folios 352-356). The minutes further recited that it was then resolved that the $250,000 of stock so to be issued should include "the stock subscribed by the incorporators of this company as evidenced by the certificate of incorporation", the incorporators thus attempting legally to lift themselves by their boot-straps.

Though the certificate of incorporation placed an obligation upon Max W. Stoehr to pay for eight shares, upon Roehlig to pay for one share, and upon deLiagre to pay for one share, the incorporators, who were not stockholders, apparently attempted to discharge that obligation by a recital that the company should accept in discharge thereof "the business agreed to be sold to the company as set forth in the preceding resolution" (plaintiff's exhibit 2, pages 186-188; folios 352-356).

The minutes next recite that it was resolved that the entire stock of the company, $250,000 "should be full paid and non-assessable". A seal was thereupon adopted, and the following were elected directors: Hans E. Stoehr, Max W. Stoehr, Georg G. Roehlig and Alfred deLiagre.

Next followed, in the rapid course of events on that short but busy winter afternoon of Monday February 19, 1917, the first meeting of the board of directors. The waiver of the directors dated February 19, 1917, waived notice of and consented to the holding of a meeting at 200 Fifth Avenue, the office of the partnership, at 4:45 o'clock P. M. fifteen minutes after the incorporators' meeting was supposed to have been held.

Hans E. Stoehr took part in the incorporators' meeting.

The offer from the partnership to the New York company was dated February 19, 1917, and was signed "Stoehr & Sons", in the handwriting of Hans E. Stoehr. At the foot thereof, on the same page, under the same date, February 19, 1917, the offer was thus accepted:

"The foregoing offer is hereby accepted upon the above terms and the said liabilities are hereby assumed.

STOEHR & SONS, INC.,
by Georg G. Roehlig,
Vice-Pres.

MAX W. STOEHR,
Sec'y."

The bill of sale annexed to the offer of February 19, 1917 (plaintiff's exhibit 3, pages 188-189; folios 357-359), was dated 19th February, 1917. It was signed "Stoehr & Sons" in the handwriting of Hans E. Stoehr, and the signature witnessed in the presence of Max W. Stoehr (plaintiff's exhibit 3, pages 188-189; folios 357-359).

The following certificates, representing the following numbers of shares of stock were made out in the following names with the following dates:

Number of Certificate	*Number of Shares*	*Name of Stockholder*	*Date of Certficate*
1	1875	Max W. Stoehr	February 19, 1917
2	357.14	Hans E. Stoehr	February 19, 1917
3	223.21	Max W. Stoehr	February 19, 1917
4	44.65	Max W. Stoehr	February 19, 1917
Total	2500		

(testimony, page 102; folio 198).

Max W. Stoehr was not named *as trustee* in either certificate No. 1 for 1875 shares or in certificate No. 3 for 223.21 shares.

Simultaneously with the issuance of the certificates of stock, Max W. Stoehr, February 19, 1917, signed a declaration of trust of certificate No. 1 for 1,875 shares in favor of Eduard Stoehr (page 249; folio 453). He executed a like declaration of trust in respect of certificate No. 3 for 223.21 shares in favor of his brother

Georg Stoehr (page 248; folio 451). He also executed a stock power in respect of certificate No. 1 for 1,875 shares appointing Eduard Stoehr his "true and lawful attorney", etc. (page 249; folio 452). Neither of those declarations of trust nor said stock power was ever delivered to either of the Stoehrs in Germany but they were merely left with the papers of the New York company.

Under the same date each of the four certificates was transferred to Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees.

As of the same day, February 19, 1917, each of said certificates was endorsed, No. 1 by Max W. Stoehr, No. 2 by Hans E. Stoehr, No. 3 by Max W. Stoehr, No. 4 by Max W. Stoehr, each endorsement purporting to be witnessed by A. deLiagre, and all ran to "Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees".

Certificate No. 5 was for 2500 shares and was made out in the name of "Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees" and was also dated February 19, 1917 (testimony, page 103; folio 198).

The next step, purporting upon the face of the papers, to have been taken, in that crowded afternoon, related to the voting trust agreement. The voting trust agreement (plaintiff's exhibit 5, pages 197-199; folios 365-370) purports to be dated 19th February, 1917, and to have been executed by Hans E. Stoehr and Max W. Stoehr "as stockholders" and by Hans E. Stoehr, Max W. Stoehr, and Georg Roehlig as voting trustees, the signatures of *all* being witnessed by Herbert A. Heyn. It provided for the deposit of the stock with the voting trustees *for five years*, till February 19, 1922 (paragraph 2 of voting trust agreement, plaintiff's exhibit 5, page 197; folio 366).

Paragraph 6 of the voting trust agreement related to vacancies and provided that in case of the death, resignation or disability of either of the voting trustees, "such trustee shall be succeeded by Alfred deLiagre".

Next followed, also on that same afternoon, the issuance of the following four voting trust certificates, all of the same date, February 19, 1917:

Number of Voting Trust Certificate	*Issued in the Name of*	*Number of Shares*
One	Max W. Stoehr, trustee	1875
Two	H. E. Stoehr	357.14
Three	Max W. Stoehr, trustee	223.21
Four	Max W. Stoehr	44.65
	Total	2500

When one considers the time that would *normally* be taken to do those things, one is led to the conclusion that the purported acts and transactions were done with unusual haste.

Then the scene changed from 200 Fifth Avenue to Passaic, New Jersey, for the next meeting of the board of directors purported to have been held "at the office of the Botany Worsted Mills, at Passaic, New Jersey", the next day, Tuesday February 20, 1917, at 10.30 o'clock. There were present at that meeting, as recited in the minutes, Hans E. Stoehr, Max W. Stoehr, Alfred DeLiagre and Georg G. Roehlig. The following is THE COMPLETE RECORD, as shown by the minutes in reference to the contract:

"The matter of the purchase of fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills WAS PRESENTED TO THE MEETING AND WAS DISCUSSED.

A form of proposed contract between this company and the corporation of Kammgarnspinnerei Stoehr & Company relating to the said purchase WAS LAID BEFORE THE MEETING.

On motion duly made, seconded and carried, the said contract was approved and the vice-president and secretary of the company were directed to execute the same in Passaic, New Jersey, for and on behalf of this company" (plaintiff's exhibit 7, page 201; folios 376-379).

There was no evidence in the entire record that at the meeting of the directors of the New York company of

February 20, 1917, at which the contract was supposed to be authorized, any consideration was given by the directors *to either the financial condition of the corporation or its ability to meet the obligations purporting to be assumed by the contract.*

The provisions of the contract will be considered in connection with our discussion of the law, but it may be noted in passing that, on the basis of the book value for the years 1917 and 1918 (defendants' exhibit U, pages 240-241; folio 444) the 14,900 shares were worth, one year from the date of the contract, February 20, 1918, when the first payment under the contract was to be made, $4,737,937.46, and two years from the date of the contract when the second payment was to be made, that is, February 20, 1919, $5,199,559.58; and that inclusive of the dividends, as contemplated by the contract, the New York company would have had to pay on February 20, 1918, to the Leipzig corporation $1,200,887.49 as the first one-fifth of the purchase price, and on February 20, 1919, as the second-fifth of the purchase price the sum of $1,-337,911.91 (defendants' exhibit U, pages 240-241; folio 444).

The book value of the 14,900 shares on February 20, 1920, as of November 30, 1919, as shown by plaintiff's exhibit 12 (page 208; folio 400), was $6,514,088.61. One-fifth of that book value, the third instalment payable February 20, 1920, would be $1,302,817.72. Adding to that three-fifths of the 25% dividend amounting to $372,000 paid on said shares from February 20, 1919, to February 20, 1920, would make $223,500.00. Total *third instalment payable February 20, 1920,* upon the face of the contract, $1,526,317.72.

The total of the first two annual payments, according to defendants' exhibit U (pages 240-241; folio 444) and of the third instalment, according to plaintiff's exhibit 12, would have amounted by February 20, 1920, to the sum of $4,065,117.12.

The inability of the New York company so far as its assets were concerned on February 20, 1917, to discharge

the obligations of such a contract, will be considered in point I.

The share capital of the Leipzig corporation was 12,000,000 marks (testimony, page 119; folio 232). It is a fact, of which the Court may take judicial notice, that the mark in the months of February and March, 1917, averaged approximately sixty-eight cents for four marks. Upon that basis the 12,000,000 marks capital of the Leipzig company on February 20, 1917, amounted in dollars to $2,047,500. Hence the contract of February 20, 1917, would have stripped the Leipzig corporation of the ownership of an asset some three times the then value in dollars of its own total share capital, measured at that time in dollars, and vested the ownership of that great asset in a New York corporation IN WHICH THE LEIPZIG CORPORATION DID NOT OWN ONE SHARE OF STOCK.

Whatever claim there might be that, though the attempt to transfer the assets of the *partnership* to the New York company was unauthorized, yet the resultant stock was issued in the same proportions in which the *partnership* interests had been held, and hence that no injury was done to the German *partners*, no such argument can be made to justify the transaction by which the Leipzig *corporation* purported to be stripped of a more than $6,000,000 asset and that asset vested in a New York company in which the stockholders of the Leipzig company generally *had no interest.*

No attempt was made upon the trial to show any identity of shareholding interests in the Leipzig and New York corporations. The stock of the New York company—all of it—was owned by the four Stoehrs in the proportions named. The stock of the Leipzig corporation was dealt in on the stock exchanges of Leipzig and Berlin, and the Stoehrs were not even shown to control a majority of the 12,000,000 marks share capital (testimony of Max W. Stoehr, page 119; folios 232-233; pages 124-125; folios 240-242).

There was no recital in the minutes of the meeting of the directors of the New York company of February 20, 1917, and nothing *of record* in the entire case, that there was any-

one present at the meeting authorized to speak for the Leipzig corporation or to dispose of an asset of that company worth over $6,000,000.

The attempt of Max W. Stoehr upon the trial to show that Hans E. Stoehr had *implied* authority to represent the Leipzig corporation in that transaction, will be considered in point II, which shows the lack of authorization to make the contract. For that reason the evidence on that point will not be discussed here. It is sufficient to point out that Max W. Stoehr did not attempt to claim that *he* had any authority, either express or implied, or that any one else than his brother Hans E. Stoehr, had any authority, either express or implied, to act for or to represent the Leipzig corporation in the transaction.

On that 20th of February, 1917, after unrestricted submarine warfare had been not only proclaimed by the German government but was mercilessly in execution, it was as certain as anything human could be that a declaration of war between the United States and Germany was only a matter of time.

The minutes of the meeting of the directors of the New York company of February 20, 1917, state that "The matter of the purchase of fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills *was presented* to the meeting and was discussed." There is no statement as to who "presented" it, and unless it was a fourth-dimensional presentation it must have been presented to the meeting by one of those present. Apparently the meeting presented it to itself.

The minutes also recite that "A form of proposed contract between this Company and the corporation of Kammgarnspinnerei Stoehr & Company relating to the said purchase *was laid before the meeting*". There is nothing in the record to show who did the "laying", or whether the contract was extracted from the air, or was evolved out of the sub-consciousness of the directors of the New York company who presumably purported to interpret the unexpressed and un-thought thoughts of the Leipzig corporation and its directors and officers, or who presumably undertook to think thoughts and conclude conclusions that

the Leipzig corporation had never thought or concluded, and to make decisions for the Leipzig corporation that the Leipzig corporation had never heard of.

The two Stoehrs, their cousin Roehlig and their relative and associate de Liagre, with their counsel Heyn, made their motions in *apparently* blissful disregard of the rights of the Leipzig corporation and *apparently* not caring whether the Leipzig corporation and its stockholders would be grossly defrauded *if what was done in fact represented the true intention of the parties to those writings.*

The agreement "made at Passaic" (plaintiff's exhibit 8, page 202; folio 380; printed at page 14; folios 25-29), was signed in the name of "Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft" by "Hans E. Stoehr", NOT AS A MEMBER OF THE AUFSICHSTRAT, NOT AS ATTORNEY-IN-FACT, NOR IN ANY OTHER CAPACITY. The whole thing was done under the advice of counsel (testimony, page 121; folio 236).

The entire record shows what care and exactitude were employed in the normal corporate acts of the Stoehrs as officers of the Botany. The fact that Hans E. Stoehr signed the contract personally, without any statement that he was acting for the Leipzig corporation, and did not sign it as its attorney-in-fact or agent, has a significance which, taken into consideration with the other facts, will not be overlooked by the Court. If the Leipzig company had authorized the contract, that fact would have been recited in the minutes and in the contract.

There was no claim made upon the trial and no attempt made to prove that there was ever any delivery of the contract to the Leipzig corporation or to anyone on its behalf.

The following are the undisputed facts regarding what was done or attempted to be done respecting the shares on or as of February 20, 1917, in or upon the books of the Botany:

(A) There is upon 2980 pages of the book of stock records of the Botany, representing the 14,900 shares, the following:

"Transferred to (PRINTED) Stoehr & Sons Inc. New York (*rubber stamp*) by deposit of certificate with (PRINTED) Geo. Stoehr, Director (*rubber stamp*). Passaic, N. J. (PRINTED) Feb. 20, 1917 (*rubber stamp*)

Hans E. Stoehr (*rubber stamp*)
Treas." (PRINTED)

(Zimmerman, page 137; folio 266).

(B) The certificates representing the 14,900 shares were not in the United States and had not been here for years.

(C) No evidence was given as to *when* those 2980 rubber stamp entries were made in the records of stock of the Botany. It was stipulated merely that "there are 2980 pages to the same general effect", but no evidence was given by plaintiff as to when said rubber stamp entries were made (testimony, page 137; folios 266-267).

(D) At the time those rubber stamp entries were placed upon the 2980 brackets on the 2980 pages of the stock records of the Botany, the Botany had not received any certificate from Leipzig respecting "the deposit of certificates with" director of the Botany in Leipzig, and there was no evidence received by the Botany that there was in fact any deposit of the certificates representing those 14,900 shares with Georg Stoehr, director in Leipzig.

(E) The statement rubber-stamped upon the 2980 brackets in the book of stock records, referring to the transfer of those certificates "by deposit of certificates with" (printed) "Georg Stoehr, Director (rubber stamp), Passaic, N. J." (printed) WAS A PALPABLE MISREPRESENTATION OF FACT. There was no "deposit of certificates with Georg Stoehr, director, Passaic, New Jersey", for the reason that neither Georg Stoehr nor the certificates were in the United States at that time. There was no evidence that the certificates had even been deposited with, or were at that time held by, Georg Stoehr, director, in Leipzig.

(F) There was no evidence that a copy of the contract, either uncertified or certified, by any officer of the New York company, was lodged or filed with, or delivered to, the Botany, as authority for the attempted transfer.

As will be shown in Point III, the universal practise of the company and the intent of the by-laws, was that in case of transfer made *in this country* the certificates were required to be presented for stamping as part of the act of transfer. That practise and requirement of the by-laws was not complied with.

(G) Zimmerman, the chief accountant of the company, and a hold-over from the German regime, testified, and his testimony on this point was uncontradicted, that the rubber-stamp notations of the transfer on the books of the Botany were made AT THE PERSONAL DIRECTION OF HANS E. STOEHR (Zimmerman, page 137; folio 267).

No evidence was offered on behalf of the complainant of any transfer or assignment, or even of the execution and delivery of any stock power, purporting to assign the 14,900 shares from or by either Hans E. Stoehr as trustee as to 10,000 shares or Max W. Stoehr as trustee as to 4,900 shares, which prior to that time had stood in their names as trustees.

ON A VITAL POINT OF THE CASE RESPECTING THE TRANSFER OF TITLE TO SAID SHARES EVEN ON THE BOOKS OF THE BOTANY COMPANY ITSELF, THERE WAS A COMPLETE AND UTTER FAILURE OF PROOF ON BEHALF OF THE COMPLAINANT.

While there were certain admissions in the testimony regarding the rubber stamp entries on the stock record of the Botany, they were made with the express reservation that the defendants did not admit that any one "was a legal transfer" (testimony, page 106; folio 204). The Court, speaking with reference to the *physical* transfer on the Botany book of the 10,000 and the 4900 shares from the names of Hans E. Stoehr and Max W. Stoehr, as trustees, said: "This admission is without conceding the validity of the transfer to effect a change of legal title."

If there ever was a case of an attempted transfer "by main strength", such a characterization would fitly apply to the making of the 2980 rubber stamp entries by Zimmerman in the record of stock book of the Botany *"at the personal direction of Hans E. Stoehr"*. To say that that was a valid transfer is absurd. It was a rubber-stamp sham, a characteristic part of the entire sham transaction.

(H) It was established by the undisputed testimony of Zimmerman that the question of the putting or the making of those 2980 rubber stamp entries upon the book of stock records of the Botany was never called to the attention of, or passed upon by, the board of directors of the Botany (testimony, pages 146-147; folios 284-285). Hans E. Stoehr was never authorized by the board of directors of the Botany to have his name, stamped with a rubber stamp, placed upon any of the 2980 brackets on the 2980 pages of the book of stock records of the Botany above the printed word "Treas." (testimony, pages 146-147; folios 284-285). There was no proof that the other officers or other directors of the Botany even knew of the 2980 rubber stamps upon the book of stock records of the Botany. There was no attempt to prove that the board of directors of the Botany had waived any of the provisions of the by-laws respecting the transfer of its shares, or that the board of directors had authorized the officers of the company to accept a copy of the contract as a compliance with the by-laws respecting the transfer of the shares.

(I) The account of the Leipzig corporation with the Botany beginning December 1, 1914, and coming down to November 29, 1916, is contained in defendants' exhibit Q (folio 438) and that account contained credits of dividends, as well as credits on account of other transactions in current account, and the payment of dividends direct to the Leipzig corporation or upon its order.

After February 20, 1917 the Botany dividends upon the shares "were credited on the Special Account" of the New York company with the Botany (Zimmerman, page 138; folio 268). NO DIVIDENDS ON THOSE SHARES WERE EVER

PAID TO THE NEW YORK COMPANY (Zimmerman, page 138; folio 268).

Defendants' exhibit T (pages 238-239; folio 443) gives the history, in condensed form, from the books of the company, as to dividends paid upon the 14,900 shares from February 20, 1917 down to January 24, 1920. We quote from defendants' exhibit T (pages 238-239; folio 443) as follows:

Date Declared Payable	*Rate*	*Amount*	
April 15, 1917	14%	$208,600	Credited to acct. Stoehr & Sons, Inc., *Special,* under date of Mar. 31, 1917.
Sept. 15, 1917	3%	$44,700	Credited to Acct. Stoehr & Sons, Inc., *Special,* under date of Oct. 31, 1917.

Those two sums, as is shown by defendants' exhibit T (pages 238-239; folio 443) were never paid to the New York company or drawn against by the New York company, but on the contrary were held in *a special account* and, pursuant to the demands of the Alien Property Custodian, were, as money belonging to an alien enemy, to wit, the Leipzig corporation, paid to A. Mitchell Palmer, Alien Property Custodian, the $208,600 on April 25, 1918, and the $44,700 also on April 25, 1918.

(J) The next transfer of the 14,900 shares was into the name of the depositary for the Alien Property Custodian.

On this point the testimony was:

> "The 14,900 shares of stock of the Botany Worsted Mills were on April 22, 1918, transferred into the name of the Peoples Bank & Trust Company as a depositary, and the entry is as follows:—

'Transferred to Peoples Bank & Trust Company as depositary for Alien Property Custodian, Passaic, New Jersey, April 22, 1918. Signed, W. J. Hellmer, Assistant Treasurer'" (testimony of Hellmer, page 177; folios 336-337).

That transfer of those shares was made pursuant to the demand of the Alien Property Custodian, duly served upon the Botany company (plaintiff's exhibit 9, pages 202-205; folios 381-382), on April 5, 1918. The demand of the Alien Property Custodian certified that the Alien Property Custodian, acting under the provisions of the Act of Congress known as *"The Trading with the Enemy Act"*, approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in him by said *Act*, and by said executive orders, after investigation had determined that Stoehr & Company (Kammgarnspinnerei Stoehr & Company) of Leipzig, Germany, was an enemy (not holding a license granted by the President) and had a certain right, title and interest in and to 14,900 shares of the common stock of the Botany Worsted Mills standing on the books of the Botany Worsted Mills in the name of Stoehr & Sons Inc.

(K) At the meeting of the directors of the New York company held at 200 Fifth Avenue, New York, March 20, 1918, James N. Wallace was elected director in place of Hans E. Stoehr, deceased. Alfred deLiagre resigned as director and Francis P. Garvan was elected in the place of said deLiagre. Georg G. Roehlig resigned as director, and Andrew B. Duvall was elected director in his place. The new board of directors on March 20, 1918 was as follows: James N. Wallace, Francis P. Garvan, Andrew B. Duvall and Max W. Stoehr (defendants' exhibit M-1, pages 272-273; folios 480-482).

On April 30, 1918, at a directors' meeting of the New York company held at 54 Wall Street, New York, James N. Wallace was elected president of the company in place of Hans E. Stoehr, deceased. Max W. Stoehr resigned as treasurer, and Louis Hesse was elected treasurer in his place.

On October 14, 1918, at a directors' meeting held at 54 Wall Street, New York, Max W. Stoehr resigned as director and secretary and Paul Kieffer was elected director in place of Max W. Stoehr. Justus Sheffield was at the same meeting elected secretary in place of Max W. Stoehr.

James N. Wallace was a director of the New York company from March 20, 1918 (defendants' exhibit M-1) and president of the New York company from April 30, 1918, down to the time of his death October 11, 1919.

(L) *Max W. Stoehr's silence in regard to the contract*

From April 30, 1918 to October 14, 1918, when the resignation of Max W. Stoehr as director and secretary of the New York company was accepted, he made no statement to the board of directors of the New York company in regard to the contract of February 20, 1917. He never made any allusion to it nor did he ever during that time make any communication to the board about the contract, by letter or otherwise (pages 171-172; folios 327-328). At no time was there any request or demand by Max W. Stoehr, or by any one on his behalf, upon the New York company, or any of its officers or directors, for any action respecting the 14,900 shares down to the time this suit was begun, December 2, 1918 (page 171; folio 327; page 179; folio 339½).

If the parties to the contract with the New York company had meant what on its face it purported to mean, it would seem that Max W. Stoehr would have made some statement about it to the directors and officers of the New York company. But during all the time he was a member of the board and secretary of the company, he made no such statement and made no claim or request or demand in reference to it.

Not only did he make no claim or even statement or communication to the board of the New York company about the contract, but at the meeting of the board of directors of the company held August 30, 1918, counsel for the company made a report to the directors as to the "*alleged* contract for 14,900 shares". *Max W. Stoehr at-*

tended that meeting of the board as a director, being at the same time also secretary of the company. The Treasurer presented to the directors a report of the accountants who had been making an examination of the books of the company in order to ascertain its financial condition and pointed out to Mr. Wallace, the president of the company, and to the other members of the board, including Max W. Stoehr, a book entry of $5,000 on the balance sheet, which was marked "Investment 14,900 shares, Botany Worsted Mills stock." Mr. Wallace asked counsel his opinion regarding that contract. Counsel thereupon explained the objects of *The Trading with the Enemy Act* and explained to the board that the contract was a palpable attempt on the part of Stoehr & Sons to lodge the ownership of the shares of stock in an American corporation under a contract which could not be carried out and which was never meant to be carried out and which was a sham. Counsel further advised Mr. Wallace and the board that he would make a formal report regarding that contract at the next meeting of the board.

Max W. Stoehr was present and said nothing about the contract and made no claim or statement regarding it (page 172; folios 328-329).

At the next meeting of the board, October 16, 1918, counsel made a further report to the board in regard to the contract, the substance of which was a confirmation of the opinion of counsel to the board at the previous meeting of August 30, 1918, when Max W. Stoehr was present, to the effect that the contract was entered into for the purpose of lodging the stock, which was alien owned, and the certificates for which were not even in this country, in an American corporation, for the purpose of evading the provisions of *The Trading with the Enemy Act.* Counsel also called the attention of the board to the fact that the company was not in a position financially to carry out the terms of such an agreement, and advised the board regarding the contract, "explaining the acts that were done, the different things that were purported to be done, and all the circumstances of it, and stating that he had come to the conclusion, and so advised the board, *that that did not represent*

the real intention of the parties" (pages 173-174; folios 331-332).

In answer to the question of the Court, the treasurer of the company, who was present at that meeting, said: "I remember him (counsel) saying that *the contract did not represent the true intent of the parties,* but that is not suggestive of anything more to me, excepting that he brought out the fact also that the company was not in a financial condition to carry out the terms of the contract" (page 174; folio 332).

(M) It was demonstrated by the defendants upon the trial that it was perfectly easy and quite in the ordinary course of every day banking and business practice at that time and for weeks before and for weeks afterwards to send wireless messages *from* the United States *to* Germany, and equally easy and customary for persons in Germany to send wireless messages *to* the United States and to conduct important business transactions by wireless, and pay and receive money by wireless. The undisputed and indisputable facts in regard to the attempt *on the face of the papers* to show a divesting of the Leipzig company's ownership in the shares and a transfer *on the face of the papers* of some title therein to the New York company, as shown by the records of the New York company and the testimony of its officers and the records and files of the partnership in the possession of the officers of the New York company, were as follows:

There was no certificate representing the shares or any part thereof or anything purporting to be such a certificate in the records, files and assets of Stoehr & Sons and Stoehr & Sons, Inc. prior to or on February 20, 1917 or thereafter (page 179; folio 325).

There was no record or evidence in the files of either the partnership or the New York company of any communication by letter or wireless or otherwise *from* the New York company *to* the Leipzig company in regard to the contract (page 179; folio 339). There was no evidence or record in those files that there had been any communica-

tion by letter or wireless or otherwise *from* the New York company *to* the Leipzig company in regard to shares (page 170, folios 325-326; page 179, folios 339-339½).

There was no record or evidence of any communication by either Hans E. Stoehr or Max W. Stoehr or any of the other persons *to* the Leipzig company or any of its officers or directors either by letter or wireless or otherwise regarding either the contract or the shares (pages 170-171; folios 326-327).

There was no record or evidence of any notice or request by letter or wireless or otherwise *from* the New York company or any of its officers *to* the Leipzig company or to Eduard Stoehr or Georg Stoehr in Germany regarding the payment for an instalment of the stock (page 179; folios 339-339½).

There was no evidence or record of any notice of any kind *from* the New York company or any of its officers *to* the Leipzig Company or any of its officers or directors in any way relating to the contract or the shares (page 179; folio 339½).

There was no record or evidence of any communication by letter or wireless or otherwise *from* either the Leipzig company or any officer or director of the Leipzig company in Germany *to* the New York company or any of its officers or directors, in regard either to the contract or the shares (page 170; folio 326; page 171; folio 327; page 179; folio 339½). There was no record or evidence of any kind in regard to any communication *from* the Leipzig company or any of its officers or directors *to* the New York company or any of its officers or directors in regard to the payment of any instalment under the contract, or any notice of any kind under or relating to the contract (page 171; folio 327; page 179; folio 339½).

There was no record or evidence of any communication by any one of the other persons engaged in the transaction *to* the Leipzig company or any of its officers or directors, or *from* the Leipzig company or any of its officers or directors *to* any one of those other persons, regarding the contract or the shares.

Finally, the records of the Botany showed, with reference to the rubber-stamp transfer of the 14,900 shares into the name of the New York company, that there was no certificate from Leipzig on file with the Botany, as required by the bylaws of the Botany company (page 137; folio 267). There was no evidence in the records of the Botany that there had ever been any deposit of the certificates representing the 14,900 shares with Georg Stoehr, who was then a director of the Botany, in Leipzig, Germany, required by the bylaws of the Botany company (page 137; folio 267).

The files of the Botany disclosed the fact that there was no record or evidence of any kind of any communication *by* the Leipzig company or any of its officers or directors *to* the Botany or any of its officers or directors in any way relating to the contract or the shares or their transfer on the books of the Botany into the name of the New York company, or in any way authorizing, sanctioning or approving, or even referring to the contract or said shares (pages 146-147; folios 284-285).

Indeed, the record shows that there was no communication by letter or wireless or otherwise either *from* the two Stoehrs in New York who were the members of the partnership or either of them *to* the two German partners or either of them, or *from* the two German partners or either of them *to* the two partners in New York or either of them, in regard to the transfer of the assets of the partnership to the New York company (page 171; folios 326-327; page 179; folio 339).

Nor was there any record or evidence of any communication by letter or wireless or otherwise from the New York company or any of its officers or directors to the two German partners or either of them regarding the transfer of the assets of the partnership to the New York company (pages 170-171; folios 326-327; page 179; folios 339-339½).

(N) Zimmerman testified unqualifiedly that the notation of the transfer of the 14,900 shares on the books of the Botany was made "to Stoehr & Sons, Incorporated, AT THE DIRECTION OF MR. HANS E. STOEHR" (page 137; folio 267).

"By the Court:

Q. I understand that when a Leipzig stockholder made a transfer, you got word of it from Mr. Georg Stoehr? You put his name in here '*By deposit of certificate with Georg Stoehr, director*' just the same?

The Witness: Yes".

(O) Dividends upon the 14,900 shares. In January or February 1915 the shares were transferred from the name of the Leipzig company, 10,000 to Hans E. Stoehr as trustee, and 4,900 to Max W. Stoehr as trustee (page 137; folio 268), but after the 1915 transfer the dividends were as before credited and paid to the Leipzig company during the years 1915 and 1916 (pages 137-138; folio 268).

After the notation on the books of the Botany by the rubber stamps of the transfer of the shares February 20, 1917, to the name of the New York company, the Botany credited the dividends to Stoehr & Sons Inc. in special account and "no dividends were paid out of that special account" (page 138; folio 268).

When asked by the Court "In whose name was the Special Account"? the witness Zimmerman responded: "Stoehr & Sons, Incorporated, Special Account" (page 138; folio 268).

(P) The bylaws of the Botany, governing the transfer of shares in Leipzig, required the receipt of the certificates for shares by a director resident in Leipzig, and that such director should "certify" the receipt of such certificates by him to the treasurer of the Botany in Passaic, or the same from a "vice-treasurer" in Leipzig. There was no vice-treasurer at Leipzig in 1914, 1915, 1916 or 1917. The only vice-treasurer elected during those years was Hans E. Stoehr, who was in the United States at that time, and that there was no vice-treasurer in Leipzig in any of the years from 1914 down to date (page 144; folio 280).

In order that this statement of facts may not be unnecessarily extended, we will not analyze here the evidence

as to (a) the previous history of the shares; (b) the facts in regard to the inability of the New York company to perform the contract; (c) the abundant opportunity of the two Stoehrs in this country, or their counsel, to communicate by wireless with the Leipzig corporation in January, February and March, 1917, regarding the contract, and the true reason why they did not do so; (d) the subsequent admissions and confessions of Hans E. Stoehr who was the chief actor in the whole transaction and the confession—in part misleading—of Heyn, counsel for the Botany and the New York company and for the Stoehrs, as to the purpose of the parties; (e) the real purpose of the two Stoehrs in this country; and (f) other relevant facts demonstrating the motives of the two Stoehrs in this country for the fabrication of the contract.

The facts bearing on these points are analyzed in the law points of our brief.

CERTAIN MISSTATEMENTS OF FACT MADE BY COUNSEL FOR THE APPELLANT:

(1) At the very beginning of his summary of facts, page 2, line 4, counsel for the plaintiffs states: *"the material facts are practically admitted"*. That was doubtless meant to lead the Court to the belief that the appellant's statement of the facts gave *all* the facts. The most "material fact" in the case was the *intention of the parties* whose names are signed to the contract. The labored efforts of counsel for the plaintiff in Point III of his brief, subdivision 2 (pages 78-83), entitled:

> *"The argument based on the letter of Heyn to the Alien Property Custodian"*

demonstrates that *that* very "material fact" and the conclusions properly deducible therefrom are not admitted. *The record facts,* the damning confession of Heyn, the two conclusive confessions of Hans E. Stoehr, the fact that there was no communication by wireless to or from the Leipzig Corporation or either of its directors or any two of its *procuristen* regarding the contract, could not of course

be denied. They were *not* admitted by the plaintiff upon the trial but were proved up to the hilt by the defendants. Only by ignoring these and other vital facts, in his statement of facts, and by seeking laboriously to explain away the admissions and confessions of Heyn and of Hans E. Stoehr, could counsel for the plaintiff argue with any plausibility that the "material facts" are practically admitted.

(2) On page 2 of his statement of facts counsel for the plaintiff states "Eduard and Georg Stoehr *lived* in Germany". He suppressed the material fact that they not only lived in Germany but were subjects of Germany and became alien enemies on the outbreak of war between the United States and Germany.

(3) On page 3 of his statement of facts counsel for the plaintiff said: "In conformity with this agreement the New York company acquired the property of Stoehr & Sons and *issued* all of its capital stock, amounting to $250,000, *to the members of the partnership* of Stoehr & Sons" (rec., pp. 187-188). The 1,875 shares of stock representing the father's share in the partnership, and the 223.21 shares representing the brother Georg Stoehr's interest in the partnership, were *not* issued to Eduard and Georg Stoehr. They were not even put in their names. They were first momentarily issued in the name of Max W. Stoehr and in the next moment were surrendered and voting trust certificates for a like number of shares were issued in the name of Max W. Stoehr, trustee.

(4) On page 3 of his statement of facts counsel for the plaintiff states that "voting trust certificates were issued for the benefit of Eduard Stoehr and Georg Stoehr to Max W. Stoehr as trustee", but he suppresses the fact that the voting trustees consisted of the two Stoehrs in this country and their cousin Roehlig, with a provision for their kinsman de Liagre to be a successor trustee. He also suppresses the fact that the voting trust was to run for five years and that, thus, the parties to the scheme hoped to make ineffectual any seizure and sale of the transmogrified alien interests.

(5) Again on page 3 of his brief, referring to the issue of voting trust certificates to Max W. Stoehr as trustee for the two alien Stoehrs, counsel for the plaintiff states that voting trust certificates were issued to Hans E. Stoehr and to Max W. Stoehr *"covering their interest in the stock issued to them respectively"*. Counsel for the plaintiff thus gives an exhibition of unconscious humour, for the scheme was palpably one designed to *"cover the interests"* OF THE TWO ALIEN STOEHRS IN THE STOCK OF THE NEW YORK COMPANY—to cover it, if possible, from the eyes of Government officials, and so to tie it down and cover it up and over by a five-year voting trust dominated by the two Stoehrs and Roehlig and de Liagre that any seizure of it would be practically ineffectual and its sale impossible.

(6) Counsel for the appellant in his statement of facts (page 4) makes the following statement:

> "On February 20, 1917 the Leipzig company entered into a contract with the New York company whereby it sold, assigned and transferred to the latter all its interest in these 14,900 shares, *and concurrently with the execution of this agreement Hans E. Stoehr and Max W. Stoehr* AS TRUSTEES *caused the shares to be transferred on the books of the Botany Worsted Mills to the New York company* (Rec. pp. 14-16)."

Aside fr[illegible] the palpable begging of the question involved in the assertion that "the Leipzig company *entered into a contract* with the New York company", the fact is that "concurrently with" the signing of that agreement, Hans E. Stoehr and Max W. Stoehr did *not "as trustees"* cause the shares to be transferred on the books of the Botany to the New York company. There is not a word or line of evidence in the case from the beginning to the end justifying or warranting that statement. There was no transfer or assignment of those shares by either Hans E. Stoehr or Max W. Stoehr *as trustees*, to the New York company, no execution or delivery of any stock power executed by Hans E. Stoehr *as trustee* or Max W. Stoehr *as*

trustee purporting to assign those shares to the New York company. Hans E. Stoehr and Max W. Stoehr *as trustees* made no such assignment and *as trustees* did not "cause" any assignment to be made to the New York company. That statement would naturally lead to the inference that the two Stoehrs in this country "as trustees" had brought about a valid assignment upon the books of the Botany of the shares to the New York company. There was no evidence in the record of any such assignment by those two *as trustees*. The statement that the two Stoehrs *"as trustees"* caused the shares to be transferred on the books of the Botany is entirely without any foundation in fact from the beginning to the end of the record.

The sole reference to the record by counsel for the appellant for that extraordinary statement is as follows: "Rec. pp. 14-16". That is a reference to the copy of the contract itself which is Exhibit 1 attached to the bill, and is found at pages 14 to 16 of the record. There is of course nothing in the contract or in that reference and nothing in the entire record to justify the statement that the two Stoehrs *"as trustees* caused the shares to be transferred on the books of the Botany Worsted Mills to the New York company".

(7) Again on page 5 of his statement of facts counsel for the plaintiff states that the New York company was organized under the supervision of Heyn, and that under Heyn's "supervision" the *"contract between it and the Leipzig company was executed"*. Here again was a statement that the Leipzig company "executed" the contract, which of course entirely begged the question.

(8) At the bottom of page 5 and the top of page 6 of his statement of facts, counsel for the plaintiff states that the Alien Property Custodian, after the seizure of the certificates representing the alien-owned shares of the New York company, called for the resignations of its directors, and chose as its directors "James N. Wallace, Francis P. Garvin, Andrew B. Duvall and Paul Keiffer", whereas the fact is that Max W. Stoehr continued as a

director from March 20, 1918, the date when Messrs Wallace, Garvan and Duvall were elected directors, down to October 14, 1918, when his resignation as a director was accepted and Mr. Keiffer was elected a director in his place.

(9) On page 6 of his statement of facts, counsel for the plaintiff states that the shares of the Botany stock had never been listed on any stock exchange and had never been traded in the open market and that the stock had no quotable market value, and then says: "The same is true of the stock of the New York company." That statement ignores the fact that the stock of the New York company stood in the name of the voting trustees and was tied up for five years by the voting trust agreement under which the two Stoehrs on this side and their cousin Roehlig were the voting trustees.

(10) At the bottom of page 6 of his statement of facts, counsel for the plaintiff states that the Alien Property Custodian "without giving to the New York company any notice that the Alien Property Custodian intended to sell these shares of stock", gave public notice that he would offer these shares for sale to the highest bidder" etc, whereas the undisputed fact is that the New York company had full and formal notice of the proposed sale. Its officers and directors considered the question very fully and at a meeting of the directors held November 1, 1918, the board unanimously adopted a resolution that it was in the best interest of the company "to offer for sale at public auction 1290 shares of the stock of the Botany Worsted Mills owned and held by this company and standing in its name on the books of the Botany Worsted Mills", and the board authorized the officers of the company to offer said 1290 shares for sale as a portion of the lot consisting of 25,700 shares in all respects as is set forth in the order of sale and the terms and conditions of sale promulgated by the Alien Property Custodian (defendants' exhibit N-1, pages 273-274; folios 483-484). The terms of sale offered in evidence as plaintiff's exhibit 10 show explicitly in the last paragraph, numbered 15, the

offer of the New York company to sell said 1290 shares which were the only shares of the Botany held by the New York company the certificates for which were in this country.

(11) On page 6 of his statement of facts counsel for the plaintiff states that "the *only* American competitors of the Botany Worsted Mills were Forstmann & Huffmann of Passaic and the American Woolen Company". For that statement he refers to the record, page 117. The testimony at that very page of the record contradicts that statement and shows that "Our competitors *chiefly* are Forstmann & Huffmann, *in some products,* the American Woolen Company, and in part of our products, in yarn, there are quite a number of concerns which are in competition with us, and in dress goods there are a number in competition with us" (page 117; folio 228).

(12) Counsel for the appellant misrepresented the decision of Judge Hand in implying, and in fact stating, that Judge Hand based his decision upon the theory that the contract was a mere *option.* In his point I (bottom of page 13 and the top of page 14) counsel for the appellant said:

> "The Court below has decided that no rights were acquired by Stoehr & Sons, Inc., to those shares on the theory that the instrument of February 20, 1917, was a mere executory contract *or an option*".

And again at the bottom of page 70 and the top of page 71 of his brief counsel for the appellant states that

> "The ultimate ground for the decision of the Court below is that * * * 'the contract conveyed nothing to Stoehr & Sons, Inc.' (Rec. p. 318), the instrument being 'not a contract of purchase, *but only an option,*' (Rec. p. 314)".

That is an unfounded and misleading statement of Judge Hand's decision. It is obviously intended to convey the impression that Judge Hand's decision was based

almost entirely, if not solely, on the finding that the paper of February 20, 1917, was merely an option. But Judge Hand's opinion expressly stated that "the point is not in any sense critical" (page 314; folios 539-540).

Judge Hand had previously pointed out in his opinion that *"if the contract was intended as written* (page 312; folio 536), the plaintiff was entitled to some relief whether it was a sale or an option (*ib.*)". The important question became, therefore, whether the contract *was intended as written.* In deciding that question in the negative, Judge Hand relied hardly at all on the theory that the paper as written was, if intended as an agreement, merely an option. He said: "Besides, to give even a colorable plausibility to the bargain, the plaintiff's position requires the assumption that the contract was mutual in its obligations" (page 314; folio 540). It was in this connection that Judge Hand said "The point is not in any sense critical". It will be noted that he did not say that the *defendants'* position required the assumption that the contract was an option, but on the contrary expressly negatived such a statement. Yet the appellant's statement now is that the defendants' position requires that the contract be held merely to be an option and that Judge Hand decided the case on the option theory, which was not the fact.

(13) The appellant states in his brief (page 79) that "Judge Hand has expressly found that there was no fraud in carrying out the plan and that illegality could not be predicated of it".

This statement is inaccurate and misleading. Judge Hand did *not* "find that there was no fraud". On the contrary he expressly said, in his opinion, that if the contentions of the appellant were correct, and the contract were what on its face it purported to be, *"it was apparently a fraud"* (page 314; folio 539). This was for the reason that Hans E. Stoehr "was in the position of selling for an apparently inadequate consideration *to his family,* property in which other persons were interested as well as they" (page 314; folio 539).

Again Judge Hand said that, while the point was not in any sense critical, but perhaps worthy of notice, the contract "was pretty clearly not a contract of purchase, but an option" (page 314; folio 540). Then he added: "But as an option for five thousand dollars to purchase during a period of five years five million dollars of shares at prices which confessedly omitted an important element of value, the contract is *too open a fraud on the Leipzig company to admit even of argument*" (page 315; folio 541).

If it can be argued that Judge Hand absolved Hans E. Stoehr from the imputation of fraud it is only on the ground that, as we contend, there was no contract at all. The appellant is in this dilemma, therefore, that, if there were a genuine contract as he contends, Judge Hand, far from finding that "there was no fraud in carrying out the plan," expressly branded it as an apparent fraud. If, on the other hand, there was no fraud, it was only for the reason that there was no intention to convey the beneficial ownership in the shares, and on that hypothesis the appellant's whole case fails.

Analysis of the Opinion of Judge Hand

The following is a brief analysis of the opinion of Judge Hand dismissing the complainant's bill and supplemental bill:

1. The suit must be regarded as dependent for jurisdiction upon section 9 of *The Trading with the Enemy Act* (page 319, folio 532). The plaintiff has no standing unless it be under section 9 of *The Trading with the Enemy Act* or unless the Act be unconstitutional (page 311; folio 534).

2. *The Trading with the Enemy Act,* and in particular the provisions thereof giving the Alien Property Custodian power of initial sequestration without a prior judicial determination that the sequestered property is enemy property, is constitutional (page 311; folios 534, 535).

3. The court *assumed for argument's sake* that

(a) A shareholder may bring a representative suit and that plaintiff has here shown a situation justifying his recognition in that capacity.

(b) That Hans E. Stoehr had a general authority for the execution of contracts for the sale of such property as the shares for a consideration such as was set forth in the contract of February 20, 1917, though that fact was in no way proved, and

(c) That "title" to the shares vested in Stoehr & Sons, Inc. in spite of irregularity under the by-laws of the Botany Mills (page 312; folios 535-536).

4. The issue then becomes what rights the Alien Property Custodian got by his seizure of the shares. That question concerns (a) first the rights of the Leipzig Company under the contract of February 20, 1917, and (b) whether the belligerent rights of the United States were greater than the rights of the Leipzig Company *inter partes* (page 312; folio 536).

5. If the contract was valid at all against the United States and *if it was intended as written,* the plaintiff was entitled to some relief, whether the contract was a sale or an option to sell, because if it were a sale the Leipzig Company must sell under its vendor's lien and such a sale would be free from the limitations of sales under section 12 as amended, and if it were an option it terminated only on sixty days' notice, and no such notice had been given (pages 312-313; folios 536-537).

6. Assuming first that the contract would be valid against the United States, the Court held *(and this was the real basis of the decision)* that the contract was not intended to represent the real purpose of the parties at all but to serve as a cover for another purpose (page 315; folio 541), that the beneficial ownership of the shares was always intended to remain in the Leipzig Company and that there never was any transfer at all (page

317; folio 544). That conclusion was based on the following reasons:

(a) The contract from the point of view of the Leipzig Company "gained nothing" for that company, since the consideration for the sale could be easily discovered and captured and the contract could therefore not be regarded as a sacrifice sale (pages 313-314; folios 538-539).

(b) The contract was not a commercial transaction for the reason that

i. The consideration was inadequate (page 314; folio 539).

ii. If the contract was intended as written, Hans E. Stoehr was in the position of selling for an apparently inadequate consideration to his family, property in which other persons were interested as well as they, and was therefore committing a fraud (page 314; folios 539-540).

iii. The plaintiff's position requires the assumption that the contract was mutual in its obligations, the Court holding upon this point that while it was not in any sense critical, the contract was probably nothing but an option and as an option the contract would be an open fraud upon the Leipzig Company (pages 314-315; folios 540-541).

iv. The written statements of Hans E. Stoehr and Heyn disclose beyond question the real purpose of the contract (pages 315-317; folios 541-544).

7. In view of the completeness of the proof that the beneficial ownership of the shares *was always intended to remain in the Leipzig company* and that there was never any transfer at all, the question whether the contract was invalid as a fraud on the belligerent rights of the United States "was not critical." On that point the Court held, however, that if the contract had been intended as written it would not have been invalid as against the United States merely for the reason that it was made on the eve of war (pages 317-319; folios 544-545).

POINT I

The contract was not intended by the parties to take effect according to its terms, but was in fact a sham and a device for the purpose of transferring from an anticipated enemy alien to a corporation of the United States the apparent legal title to the stock, without transferring or intending to transfer the real ownership of the stock

I

In this point we will assume, although, as will be demonstrated in Point III, such was not the fact, that the contract between the New York and the Leipzig corporation for the sale and the subsequent transfer of the shares on the books of the Botany into the name of the New York company, would have transferred to the New York company *an equitable* right to the shares, *if the contract had expressed the real intention of the parties.* For the purpose of this point, we will treat the contract as though there were no executory features in it such as would authorize its annulment because of the existence of war between the governments of which the contracting parties were nationals, although, as will be demonstrated in Point V, there were many executory features in the contract which rendered it void upon the occurrence of war.

Assuming the foregoing, we will in this point demonstrate that the contract *was never intended by the parties to take effect according to its terms,* but was in fact a sham and a device for the purpose of transferring from an anticipated enemy alien to a corporation of the United States the legal title to the stock, with the intent that upon the cessation of war, then imminent, or upon the occurrence of other conditions which would make it possible and practicable, the New York company would retransfer to the Leipzig corporation that which it had received under the contract, and the parties would be restored to their former positions. The New York com-

pany was in the meantime to hold the stock in reality in trust for the Leipzig company, the real owner. In this view of the facts, we will contend that the contract never became in point of law a real contract and that it would not have divested the Leipzig corporation of its ownership in the stock, nor vest such ownership in the New York company, even if war had not been declared between the United States and Germany on April 6, 1917.

An analysis of the contract discloses certain extraordinary features unusual in genuine business transactions between parties dealing at arms length. It is of a nature such as no contract could or would reasonably be between sane and prudent persons dealing on a purely business basis. The true nature of the contract as a business transaction may be seen by a statement of the relative benefits accruing to the parties upon the facts as they were on February 20, 1917, if we assume that the contract was an honest transaction *of the nature it purported to be.*

II

Benefits to the New York Company

(1) Immediate transfer to it of the legal title and beneficial ownership of the shares (plaintiff's exhibit 8, page 202; folio 380; printed at pages 14-16; folios 25-29). The total stock of the Botany was 36,000 shares. The voting control of Botany was and is 18,001 shares. One day previous to the date of the contract, namely on February 19, 1917, the New York company had received by a transfer to it of the assets of the partnership, the legal title to 5690 shares. Hence the contract attempted to transfer to the New York company sufficient additional shares to give the New York company the legal title and beneficial ownership of 20,590 shares, more than sufficient to elect and control the directorate of the Botany and to determine all questions which might be decided by its stockholders.

The next stockholders' election would regularly have been held on the third Tuesday of March 1917 (by-laws of the Botany, defendants' exhibit J, article XIII, paragraph

1, page 226; folio 427). The by-laws provided that the "annual meeting of the stockholders of the company shall be held on the third Tuesday of March of each year at 12 o'clock noon for the election of new directors and other business". A stockholders' meeting was to be held, and in fact was held, about four weeks after the execution of the contract (defendants' exhibit V, page 243; folio 445). Hence under that contract the New York company was given practically immediate right to put in as directors of the Botany its own nominees solely, and to control solely the policy of the Botany.

(2) Immediate right to the New York company to receive *all* dividends payable subsequent to February 20, 1917 on the shares until that stock should be re-transferred into the name of the Leipzig corporation on the books of the Botany pursuant to the provisions of the contract.

The dividends so covered by that right included those for the fiscal year ended November 30, 1916, which, under the by-laws, would be determined prior to or at the time of the annual meeting three or four weeks after the execution of the contract. As was shown by defendants' exhibit T (pages 238-239; folio 443) the dividend upon the shares, payable April 15, 1917, amounted to $208,600.

That dividend of $208,600 was an annual dividend of fourteen per cent (14%), declared by the stockholders, at their annual stockholders' meeting, after the approval of the balance sheet of the company for the fiscal year ended November 30, 1916. The contract also entitled the New York company to receive the regular semi-annual dividend of three per cent (3%), payable September 15, 1917, which, as shown by defendants' exhibit T, amounted on the shares to $44,700.

(3) Permanent ownership of the shares upon payment therefor in five annual instalments of the purchase price. That purchase price was provided by the contract to be based upon the book value of the shares as shown by the Botany books, *excluding all good will*. The first instalment was one-fifth of the book value as of November 30,

1917, plus the amount of the dividends to be received by the New York company on all the shares up to the time of that first payment. The second instalment was to be one-fifth as of November 30, 1918, plus an amount equal to the dividends to be received by the New York company during the second year upon four-fifths of the shares, and so on.

(4) If the contract had actually been what on its face it purported to be, it would have been a monstrous fraud upon the Leipzig company for the reason that it was provided in the contract, paragraph second, sub-paragraph (c), that

"In arriving at the amount of each instalment for each of said years, the net worth of the hard assets of the Botany Worsted Mills, after deducting the total liabilities, shall be taken as the basis of computation of the value per share, AND NO ALLOWANCE OR INCREASE SHALL BE MADE ON SUCH INSTALMENT FOR GOOD WILL" (page 15, folio 27).

And yet the complainant himself testified that

"The mill had grown in the 1890's very rapidly and had passed over the very bad years of 1900 in very good condition and had grown to be a plant employing almost 7000 people" (page 105; folio 202).

Up to 1916 "it was very prosperous" (page 105; folio 202). The plant has about 140 acres. It has 2100 and some odd looms, about 90,000 worsted spindles and 10,000 woolen spindles (page 105; folio 202).

"We prided ourselves that we were very efficient in every way and very well equipped and that the machinery was kept in very good order and it has always been stated as such" (pages 105-106; folio 203).

The turnover in 1917 was $28,000,000 (page 106; folio 203).

All the evidence in the case shows that the company had a highly prosperous and successful business, which necessarily *and in fact* enjoyed *a large amount of good*

will. Hans E. Stoehr, in selling to himself and his associates in the New York company the stock control of the company on the basis of the value of its "hard assets", would be transferring those shares of stock *at a grossly inadequate price.* It is absurd to say that one holding the control of a company like the Botany would sell stock which enabled the buyer to obtain the control on the basis purely of the value of the tangible assets, WITH NO ALLOWANCE FOR GOOD WILL, TRADE MARKS, TRADE NAME, OR ANY OF THE OTHER FACTORS THAT ENTER INTO THE GOOD WILL OF A WELL-ESTABLISHED AND HIGHLY PROSPEROUS BUSINESS.

III

Shadowy Rights to the Leipzig Corporation

(1) Receipt of $5,000 as expressed by the contract, but which was never paid to the Leipzig corporation, and was the subject merely of a bookkeeping entry.

(2) The privilege of receiving the purchase price had the New York company *elected to receive* the shares and make the payments called for by the contract.

(3) In case the New York company should fail to pay any instalment of the purchase price, to retain the certificates for such shares and have the shares themselves re-transferred upon the books of the Botany into the name of the Leipzig corporation.

The net worth of the Botany at the time of the execution of the contract was made up of (a) its capital, (b) its paid-in surplus, and (c) its surplus from operations (plaintiff's exhibit 11, pages 206-207; folios 397-399). The financial statement of the Botany as of November 30, 1917, shows that in addition to the capital of $2,600,000 there was "a paid-in surplus" of $1,050,000, and an "actual surplus from operations" of $6,797,356.78 (plaintiff's exhibit 11). Hence the net worth of the Botany in February 1917, with no allowance for good-will, trade marks or trade names, would be approximately the total of these sums or $11,447,356.78.

The earnings of the Botany and the condition of its assets and its surplus were of course well known to the ostensible contracting parties. The book value of the stock, as of November 30, 1917, was, as shown in defendants' exhibit U, over $317 per share (pages 240-241; folio 444). *There was therefore no increase of price payable under the contract* BECAUSE OF THE TERMS OF CREDIT. The amount which the seller would receive in case the purchase price were paid would be no more than the actual value exclusive of good will, plus the amount of dividends.

It is to be noted, however, that there was *no obligation* on the part of the New York company to pay for the stock if it did not choose to do so. The only penalty for non-payment provided in the contract was to be the loss of the record title to the shares for which payment was not made, plus the loss of the $5,000, in fact only a paper credit, if even that (testimony, page 138; folios 268-269).

The aggregate annual dividends on the Botany stock had for several years previously been very large and the company was in a very prosperous condition (testimony of Max W. Stoehr, pages 105-106; folios 202-204). The condition of the company, at the time of the execution of the contract warranted the belief, justified by the event, that the previous dividends would be continued, if not exceeded, for the next succeeding years. The amount of the dividends on the shares, between February 20, 1917 and February 20, 1918, was in fact $253,300 (defendants' exhibit U, pages 240-241; folio 444). The contract contemplated that dividends on the shares, so long as they stood in the name of the New York company, should be received by the New York company, and be retained by it, *irrespective of any subsequent default.* The only penalty for default was to be the loss of the privilege to receive permanent ownership of the shares, and the "re-transfer" of the shares back into the name of the Leipzig company on the books of the Botany company.

The agreement therefore *contemplated by its expressed terms,* viewed in conjunction with the surrounding facts and circumstancs known to both ostensible contracting

parties, that the New York company should have the privilege, if it so desired, of receiving the sum of $253,300, in dividends from the Botany company, upon an initial paper credit of $5,000, and that privilege was one which, under the terms of the contract, the Leipzig company could in no way destroy. The most the Leipzig company could do was, by a demand for non-payment of the one-fifth purchase price, due February 20, 1918, to put the New York company in such default that it should be deprived of *further* dividends which might be payable *more than sixty days after such a demand.* But it will not be overlooked that the New York company would be entitled *under the express terms* of the alleged contract to receive *all* further dividends paid within that sixty day period. The New York company could not be put in default until a demand was made by the Leipzig company for the first one-fifth of the purchase price. The Leipzig company could not make that demand before February 20, 1918. And the New York company would not be in default until sixty days *after* the making of such demand, and the New York company would be entitled to *all* the dividends on the stock up to the expiration of that sixty days default period.

The Botany dividends were payable and paid about the 15th of April and the 15th of September in each year (Botany by-laws, defendants' exhibit J, pages 225-228; folios 427-429). With the New York company in control of the board of directors of the Botany, as it would be under the record ownership of the shares, combined with the other shares held by the New York company, the time of payment of the Botany dividends could easily be fixed so as to fall between February 20 and April 20 in each year, so as to come within the period BEFORE WHICH the New York company would be in default, and the Leipzig corporation could be entitled to the "re-transfer" of the shares, the purchase price of which was in default, back into the Leipzig corporation's name.

Hence as a sheer matter of fact, the contract put it into the power of the New York company to receive dividends, amounting on the shares, for the year 1917, to $253,300 (defendants' exhibit U, pages 240-241; folio 444), and also

for the year 1918, at the actual declared rate of twenty-five per cent (25%), amounting to $372,500 (defendants' exhibit U), making a total of $625,800 to be received between February 20, 1917 and February 20, 1918, *without any compensating payment to the Leipzig corporation whatever.*

But more astounding still, the contract expressly provided in its concluding fifth paragraph (page 16; folios 28-29) that in the event that any of the annual instalments should not be paid when due, the Leipzig company might notify the New York company *"in writing"* that it required the payment of the instalment then due and if the New York company should not *within sixty days after* such a demand pay the instalment, then the shares of stock or any remaining balance of stock was to be "forthwith re-transferred" to the Leipzig company, all the rights of the New York company to the stock were to cease and "the Leipzig company shall retain the five thousand dollars ($5,000) paid on account as hereinbefore recited, IN FULL SETTLEMENT OF ANY CLAIM AGAINST THE NEW YORK COMPANY, AND THEREUPON NEITHER OF SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT".

A contract which must necessarily or could have had the effect stated above, was either intended as a matter of fact to make an actual gift of $625,800 by the alleged seller to the alleged buyer, or there was between the parties an understanding not expressed in the instrument whereby the buyer was to perform for the seller services of some character, or to give to the seller a consideration of some sort, which the seller deemed worth the amount of those dividends, or the parties DID NOT REALLY INTEND THAT THE BUYER SHOULD HAVE THE PRIVILEGE OF KEEPING THOSE DIVIDENDS, BUT INTENDED THAT THE DIVIDENDS SHOULD BE HELD IN TRUST FOR THE SELLER UPON SOME SECRET UNDERSTANDING, OR THE PARTIES IN SOME OTHER FORM HAD SOME SECRET UNDERSTANDING OR AGREEMENT NOT EXPRESSED IN THE CONTRACT WHICH WHOLLY NULLIFIED THE TERMS OF THE CONTRACT.

It should be borne in mind in this connection that the contract (page 14, folios 25-29) *expressly* on its face contemplated the receipt of the dividends by the New York company, for it provided in article second, subdivision (d), that in addition to the book value of the shares there "shall be taken into consideration and account the amount of the dividends *received* by the New York company during the said five years from date in the following manner: *During the first year the amount of the entire dividends received by the New York company on the said shares* shall be added to the purchase price and shall be paid with the first instalment; *during the second year four-fifths of the entire dividends received on said shares of stock by the New York company;* during the third year three-fifths of said dividends; during the fourth year two-fifths of said dividends, and during the fifth year one-fifth of said dividends *so received on said shares* shall be added to the annual instalments of the purchase price and shall become part of said purchase price and shall be payable with each of said instalments at the end of each of said respective years."

The Leipzig company never knew of the existence of the contract. But assuming for the purpose of this discussion that it *had* known of the existence of the contract, it would never, *in the absence of a secret understanding,* have agreed to the terms of its fifth paragraph which expressly provided that in the event of the termination of the contract at the option of the Leipzig company at the end of sixty days' notice, the Leipzig company should retain the $5,000 "*in full settlement of any claim against the New York company* AND THEREUPON NEITHER OF THE SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT."

Under the contract the purchase price of the shares was to be determined by the book value of the shares as shown by the books of the Botany (paragraph second (a). The purchase price was payable in five instalments, the first in one year from the date of the agreement, February 20, 1918, and the subsequent instalments respectively in two,

three, four and five years from February 20, 1917 (contract paragraph second (a). From the last or fifth instalment the $5,000, recited in the alleged contract, with interest at six per cent. from the date of the agreement, was to be deducted (paragraph second (a).

The provisions of the contract, paragraph second (c), that only "the net worth of the 'HARD ASSETS' of the Botany should be taken as the basis of the share price and that NO ALLOWANCE OR INCREASE SHALL BE MADE ON SUCH INSTALMENT FOR GOOD WILL", demonstrates that the contract would be a fraud on the Leipzig company, if it was meant to be carried out as written.

IV

THE AMOUNT OF THE PAYMENTS TO BE MADE BY THE NEW YORK COMPANY

The records of the Botany show what would have been the obligations assumed by the New York company under the contract had the parties meant the contract as written. The book value of the shares on February 20, 1918, one year from the date of the contract, taken as of November 30, 1917, as expressly provided by the contract, and as shown by defendants' exhibit U (pages 240-241; folio 444), was $4,737,937.46.

The expression "hard assets" was never used in the bookkeeping of the Botany and was an unfamiliar term to the officers and accountants of the company (page 142; folio 276). The book value was computed, as shown on defendants' exhibit U, by taking the sum of the capital stock, paid-in surplus and surplus from operations, and dividing that aggregate by 36,000, the total number of shares outstanding. Defendants' exhibit U showed the book value of the shares on February 20, 1918, and February 20, 1919. In making up defendants' exhibit U, which demonstrated how the provisions of the contract would have worked out, no account was taken of trade-marks or patents or anything other than inventory, accounts re-

ceivable, real estate and plant, and *no allowance whatever made for good will* (testimony pages 142-143; folios 276-277).

One-fifth of $4,737,937.46, the book value of the shares (the first instalment payable February 20, 1918) was $947,587.49. Dividends declared and paid on the shares from February 20, 1917 to February 20, 1918, amounted, as shown on defendants' exhibit U, to $253,300. The total of the first payment due under the contract on February 20, 1918, would have amounted, therefore, as demonstrated by defendants' exhibit U, to $1,200,887.49.

On the same basis the book value of the shares on February 20, 1919, as of November 30, 1918, was, as shown by defendants' exhibit U, $5,199,559.58. One-fifth of that book value (the second instalment payable February 20, 1919) would be $1,039,911.91. Dividends declared and paid on the shares from February 20, 1918, to February 20, 1919, amounted, as shown by defendants' exhibit U, to $298,000. The total of the second instalment of the purchase price due on February 20, 1919, under the terms of the contract, was, as shown by defendants' exhibit U, $1,337,911.91.

On the same basis the book value of the shares on February 20, 1920, as of November 30, 1919, would be $6,514,-088.61. One-fifth of that book value (the third instalment payable February 20, 1920) would be $1,302,817.72. Add three-fifths of dividends amounting to $372,000 (25%) paid on the 14,900 shares February 20, 1919, to February 20, 1920, being $223,500. The total payment that would be due February 20, 1920, would be $1,526,317.72. (This computation is based upon plaintiff's exhibit 12, pages 208-209; folio 400.)

It is obvious, therefore, that by the terms of the contract the New York company purported to assume an obligation to pay in cash on February 20, 1918, $1,200,887.49, on February 20, 1919 the sum of $1,337,911.91 and on February 20, 1920, the sum of $1,526,317.72, together with two subsequent instalments in the two following years, which certainly would be much greater than the first instalments.

V

This leads to a consideration of the INABILITY OF THE NEW YORK COMPANY TO MEET SUCH OBLIGATIONS.

The balance sheet of the New York company as of February 20, 1917 (plaintiff's exhibit 13; folio 401), showed nominal assets of $2,848,058.32. The liabilities, as shown on that balance sheet, were $1,641,528.79. The apparent net worth of the company as of that date was accordingly $1,206,529.53. But among the assets, as shown by the balance sheet, were a number of assets of doubtful value, and were so designated (plaintiff's exhibit 13). Deducting the conceded doubtful assets, as shown by plaintiff's exhibit 13, of $117,020.68, from the apparent net worth of the company, on February 20, 1917, in the sum of $1,206,529.53, left net worth as shown by the books of the company, on February 20, 1917, of $1,089,508.85 (plaintiff's exhibit 13, first column).

We have stated that those were only apparent values. That they were but apparent values, at least so far as the ability to make large payments or to provide the money for large payments was concerned, is shown by the fact that among the assets of the company, shown on the balance sheet, were 6090 shares of the Botany stock, which are designated on the balance sheet as good assets. The 6090 shares were carried at the value of $975,867. Of the 6090 shares, certificates for only 1290 shares were in this country in possession of the company (testimony of Hesse, page 175; folio 334). It would have been impossible to realize any money by borrowing or otherwise upon shares of stock the certificates for which were in Germany. The 1290 shares represented only approximately one-fifth of the total holdings of the company in the Botany stock. The value of that asset, in so far as it could be used for the purpose of realizing money to meet the obligations of the company, was approximately $195,173.40. In other words, the "net worth"

of the company at that time would have to be reduced by the sum of $780,693.60, in order to arrive at the true net worth even on the books which could properly be used to ascertain the ability of the company to meet its financial obligations.

Any banker would compel the deduction of the sum of $780,693.60, representing the value of the shares of stock of the Botany, as shown on the books of the company, certificates for which were in Germany. That would reduce the net worth of the company on its books on February 20, 1917, to $308,815.25 (plaintiff's exhibit 13; folio 401). It will also be observed that among the current assets of the company, as of February 20, 1917, there was but $14,537.07 in cash, and a merchandise inventory of $1,264,538.14, *which was not bankable collateral at all.*

It will thus be seen that a company having a net worth for borrowing purposes on its books of approximately $308,815.25, but with hardly any real borrowing power so far as bankable security went, purported to incur an obligation to purchase shares of stock at a purchase price of much over $6,000,000, payable in five annual instalments of from one and a quarter million to one and one-half million dollars each.

Plaintiff's exhibit 13 (folio 401) gives in condensed form the net worth of the company, after deducting doubtful assets, upon the following dates in addition to February 20, 1917: December 31, 1917, February 20, 1918, March 20, 1918, December 31, 1918, February 20, 1919 and December 31, 1919. As of February 20, 1918, the apparent net worth of the company, on the basis above stated, was $797,555.60 (plaintiff's exhibit 13). That amount included "merchandise," which was not bankable collateral at all, in the sum of $392,036.28. On that date the 6090 shares of stock of the Botany were, as before, carried at the sum of $975,867. Hence the company was in no position on February 20, 1918 to borrow much money of a bank, for, making the proper deduction for the certificates of stock that were in Germany, it will be seen that the net worth of the company, as of February 20, 1918, had practically disappeared, amounting to only

$16,862. The amount payable under the contract on February 20, 1918, as shown above, was $1,200,887.49.

Again, the actual net worth, as of February 20, 1919, of the company, as shown on the balance sheet (plaintiff's exhibit 13), was $912,220.12. That amount again included in the assets merchandise in the sum of $392,036.28 (plaintiff's exhibit 13, sixth column). Again, that also included the 6090 shares of the Botany stock, at the same valuation of $975,867. Again deducting the value of the 4800 shares in Germany out of the 6,090 from the net worth of the company, as shown by the balance sheet, we find that the real net worth of the company, on February 20, 1919, the date of the second theoretical annual payment on the shares, available for the purpose of meeting the obligation, is $131,526.52. That would be the net worth of the company at the time it would have been called upon to pay the second instalment, as shown by defendants' exhibit U. of $1,337,911.91.

The actual net worth as of December 31, 1919, of the company as shown on the balance sheet (plaintiff's exhibit 13; folio 401) was $1,082,133.70. This amount again included the 6,090 shares of the Botany stock at the same valuation of $975,867. Again deducting the value of the 4800 shares in Germany out of the total of 6,090 from the net worth of the company as shown by the balance sheet, we find that the worth of the company on December 31, 1919, less than two months prior to the date of the third theoretical annual payment on the shares available for the purpose of meeting the obligation, is reduced to $301,440.10. That would be the amount of the net worth of the company shortly prior to the time it would have been called upon to pay the third instalment of $1,526,-317.72 (plaintiff's exhibit 12, pages 208-209; folio 400).

VI

We now come to another significant fact, which demonstrates that the contract and the transfer of the shares to the New York company on the books

of the Botany, were not intended as a *bona fide* transfer, and that is that THE DIVIDENDS PAYABLE IN THE YEAR ENDING NOVEMBER 30, 1917, WERE NOT PAID TO THE NEW YORK COMPANY.

The New York company was on and after February 20, 1917, and until after the end of the fiscal year, the record owner of those shares. Had it been the real owner of those shares, the dividends declared and payable during that period would have been payable to it. The contract expressly contemplated such payment. But, as shown by defendants' exhibit T (pages 238-239; folio 443), no such payment was made. The fourteen per cent. dividend declared and payable April 15, 1917, amounted to $208,600. The regular semi-annual three per cent. dividend provided by the by-laws (defendants' exhibit J, article XXI, paragraph 1 and paragraph 2 (c), page 228; folio 429), declared and payable September 15, 1917, amounted to $44,700. Those two dividends amounted to $253,300. *They were not paid to the New York Company.* They were credited in an account entitled "Stoehr & Sons Inc. *Special*", on the books of the Botany. The first credit on the books of the Botany in that *Special Account*, as shown by defendants' exhibit T, was under date of March 31, 1917. The date of the credit in the *Special Account* upon the books of the Botany of the $44,700 was October 31, 1917.

As shown by defendants' exhibit T, the dividends so credited to Stoehr & Sons Inc. *Special Account* were paid to the Alien Property Custodian by the Botany company on April 25, 1918, as the property of the Leipzig corporation, an alien enemy, and not as the property of the New York corporation.

The fact that those dividends were not paid to the New York company, but were specially credited in a *special account* specially opened, would seem to show, taken into consideration with the other facts referred to, that the New York company was not deemed even by the two Stoehrs in the United States, or by the officers and directors of the New York company, the beneficial owner of the shares. There was no reason shown by the plaintiff for

setting aside and holding those dividends in that special account. If the contract was what it purported to be, and if the transfer to the New York company had been a real and *bona fide* transfer, vesting the beneficial ownership of the stock in the New York company, there is no reason, so far as the record shows, why the New York company should not have received those dividends, as expressly provided in the contract.

The reason those dividends were credited in that special account was that Hans E. Stoehr, as the chief actor in the fabrication of the alleged contract, *did not intend to effect any transfer of property beyond such as was absolutely necessary to give an apparent title to the shares on the books of the Botany to the New York company.* That fact tends to establish that the contract and the attempted transfer thereunder, were not a *bona fide* contract and transfer, and that the whole transaction purported to be one thing on its face and was in reality another, and that it was a mere sham.

VII

Although in February 1917 diplomatic relations between Germany and the United States had been severed it was clearly established that actual commercial communications by wireless between the two countries were not only possible *but took place in large volume.*

It was proved by *uncontradicted testimony* that communication between Germany and the United States continued by wireless messages right up to April 6, 1917, the date of America's entry into the war (testimony of Barrand, page 157; folio 304). Messages were sent from the United States by wireless to, and were received in Germany, and were sent from Germany to the United States by wireless, and received in the United States, up to that date (testimony, page 158; folio 304).

The defendants proved upon the trial by the most conclusive testimony that wireless messages were sent to and received from Germany *and money transferred by wireless* IN LARGE AMOUNTS between Germany and the United States

during January, February, March and right up to April 6, 1917. The superintendent of tariffs of the Postal Telegraph Company, which operated the Sayville wireless station, and the superintendent of tariffs and officers of the Western Union Telegraph Company, which operated the Tuckerton wireless station, testified to that effect, as did also one of the vice-presidents of the National Bank of Commerce in New York, who had sent and received such messages and made such transmissions of money by wireless and testified as to the practise of other banks and companies during that time.

The defendants' proof on this subject was conclusive. It is summarized in the appendix submitted with this brief. It is there shown that *business* communications were censored in order to be sure that military information might not be conveyed to Germany. Whether the wireless messages were open messages or in code, they were accompanied by proof, satisfactory to the Government, that they dealt with business matters only (testimony of Barrand, summarized in appendix). Hence though the New York company could have readily communicated by wireless with the Leipzig company, such communication would have made a record, which is precisely what the New York company and the two Stoehrs in New York wished to avoid.

Why was the contract, drawn in a formal manner, signed *in the name of the Leipzig corporation by Hans E. Stoehr personally*, without any specific authority from, and without any communication with the Leipzig corporation?

The total value in dollars of the 12,000,000 marks share capital of the Leipzig corporation at that time was some $2,047,500. The value in dollars of the 14,900 shares, even excluding good-will—a very *vital* part of the value—was over $6,000,000. Hence we have a contract dealing with an asset of the Leipzig corporation over three times the *then* total value in dollars of the Leipzig corporation's share capital. Is there any reasonable explanation of the making of that contract in the particular manner in which it was attempted to be made rather than in the usual and normal manner by direct

communication between Hans E. Stoehr and his brother Max W. Stoehr or the New York corporation, and the Leipzig corporation, EXCEPT THE FACT THAT IT WOULD BE DANGEROUS—FATAL TO THE SCHEME, IF DISCOVERED—TO EXPLAIN SATISFACTORILY TO THE GERMAN COMPANY IN AN OPEN TELEGRAM THE TRUE NATURE OF THE TRANSACTION IN SUCH A WAY THAT THE GERMAN COMPANY WOULD HAVE APPROVED OF IT? Does not the form of the contract itself, including its execution by Hans E. Stoehr, as testified by Max W. Stoehr, under the *implied* authority of the Leipzig corporation, necessitate the conclusion that he was *obliged* to take the bull by the horns and make the contract for the Leipzig corporation on his own initiative, without *any* authority, trusting to make the proper explanation to the Leipzig corporation subsequently, BECAUSE IT WAS IMPOSSIBLE FOR HIM TO EXPLAIN OPENLY TO THE LEIPZIG CORPORATION THE REAL PURPOSE OF THE CONTRACT AND BECAUSE IT WAS IMPOSSIBLE FOR HIM TO OBTAIN FROM THE LEIPZIG CORPORATION AUTHORIZATION FOR THE CONTRACT, WITHOUT SUCH EXPLANATION?

VIII

In any other aspect of the case the contract would be a fraud upon the Leipzig corporation. All the risk was taken by the Leipzig corporation. No risk was assumed by the New York company. The contract vested the voting rights in the shares in the New York company. Those shares, together with the 5,690 already held by the New York company, gave the New York company voting rights in 20,590 shares of the stock. That gave the New York company the absolute right to nominate, elect, control and remove at will the officers and directors of the Botany. It placed it absolutely in the power of the New York company to fix the salaries of officers, vote bonuses and extra compensation, pile up reserves for depreciation, charge off any amounts they desired for bad accounts, and fix absolutely, in its uncontrolled discretion, for the period of five years covered by the contract, *the book value of its stock*. AND BOOK-VALUE WAS TO BE THE BASIS OF PAYMENT FOR THE 14,900 SHARES NAMED IN THE CONTRACT!

A more palpable fraud upon—theft from—the Leipzig corporation, *if the contract was what it purported on its face to be,* it would be difficult to imagine.

If there had been no war, the contract would have been repudiated by the Leipzig corporation as a swindle.

If there had been an absolute identity in the stockholders of the New York company and of the Leipzig corporation, the contract would still have been illegal and a fraud. But there was no such identity. The entire Stoehr family did not own even a majority of the stock of the Leipzig company.

The two Stoehrs in Germany in 1917 were only a minority of the board.

To say that the Leipzig corporation, unless its directors were lunatics, would have authorized or approved such a contract as that of February 20, 1917, is the height of absurdity. At that time marks were going down and dollars were not. At that time Germany was feeling the pinch of the blockade. It is obvious that owing to the shortage of wool and the stringency of the blockade, the business of the Leipzig corporation must have been suffering. The value of its share capital at that time in dollars was approximately \$2,047,500. The approximate value of the 14,900 shares at that time was much more than \$6,000,000.

If in February 1917 America's entry into the war had not been imminent, that \$6,000,000 American asset, represented by the 14,900 shares, must have been "the one bright spot" on the business horizon of the Leipzig corporation. It is unthinkable that sane directors of that corporation would have sanctioned such a contract *if it represented the real intentions of both parties.* If the United States had not entered the war, of course the contract would have been repudiated. That the contract was concocted by the two Stoehrs and their counsel in this country for the purpose of forestalling the action of the United States *in the war* then known to be inevitable is confessed in the Heyn & Covington letter, *approved* by Hans E. Stoehr, the chief conspirator. That letter will be considered presently.

IX

On December 6, 1917, Max W. Stoehr swore to the report in the name of the New York company to the Alien Property Custodian (page 104; folio 201). Counsel for the complainant contends that the report was evidence of the good faith of the officers of the New York company.

That sworn report made was misleading and deceptive.

On December 11, 1917, the Botany company made a report, sworn to by its president Prehn, to the Alien Property Custodian (defendants' exhibit P-1, pages 274-276; folios 487-490). THE BOTANY REPORT REFERRED TO THE CONTRACT AND THE 14,900 SHARES. The report of the New York company, sworn to by Max W. Stoehr (plaintiff's exhibit 4, pages 189-196; folios 361-364a), MADE NO REFERENCE TO THE CONTRACT.

As a result of the examination by the Alien Property Custodian of the Botany report, additional information from the New York company was demanded by him and a conference was held in Washington in regard to the matter (page 130; folio 257).

Shortly after the demand of the Alien Property Custodian for additional information, Herbert A. Heyn, of the firm of Heyn and Covington, counsel for the Botany and the New York company (page 122; folio 237), and Nicholas F. Lenssen another lawyer, who was associated with Heyn, went to Washington, to explain matters (testimony page 130; folios 257-258). There were present at the conferences Heyn and Lenssen, Judge Brodhead and Mr. Duvall. Judge Brodhead requested Heyn and Lenssen to make a written statement of what they had told Judge Brodhead orally at those conferences, and Heyn and Lenssen undertook to do so (testimony page 130; folio 257). The letter of Heyn, dated February 9, 1918 (defendants' exhibit F, pages 218-223; folios 417-423), was received by the Alien Property Custodian on February 10, 1918 (page 223; folio 423).

The letter was entitled:

"Botany Worsted Mills,
Stoehr & Sons Inc."

It described the Botany, stated its capital stock, summarized its by-laws, explained the number and personnel of its directors, the unusual nature of the directorship, pointed out the two vacancies on the board, gave the date of the annual meeting of the company, and *other record details,* and then, turning to the New York company, gave the date of its incorporation, submitted a copy of the certificate of incorporation and the by-laws of the company, stated the amount of its capital stock, its officers and directors, and then followed a statement with respect to "Stoehr & Company, the Leipzig Corporation."

It gave certain *record details* as to the "stock control of the Botany Worsted Mills", and then stated:

"Regarding the contract for the purchase of said 14,900 shares of Stoehr & Sons Inc., from Stoehr & Co., of Leipzig, Germany, IT HAS BEEN FULLY EXPLAINED that the CONTROL OF BOTANY MIGHT BE IMPERILED BY A STATE OF WAR, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of THE VOTING RIGHT, THE CONTROL OF BOTANY MIGHT BE LOST. This contract was made with REFERENCE TO THE CONTROL OF BOTANY AS BETWEEN ITS STOCKHOLDERS AND HAD OF COURSE NO REFERENCE TO THE STATUS OF SUCH CONTROL SO FAR AS THE ALIEN PROPERTY CUSTODIAN IS CONCERNED. Such status is not affected whether such shares are in Stoehr & Co. the Leipzig corporation or in Stoehr & Sons Inc. the New York corporation. AS WE ALSO STATED VERBALLY THERE HAVE BEEN NO RESOLUTIONS OR OTHER CORPORATE ACTION BY STOEHR & CO., THE LEIPZIG CORPORATION, IN CONFIRMATION OF THIS TRANSACTION" (Heyn and Covington's letter of February 9, 1918, defendant's exhibit F, page 222; folios 421-422).

The letter concluded with the following statement:

"To summarize: While Botany is managed in this country, CONSIDERABLY MORE THAN A MAJORITY OF ITS

STOCK IS CONTROLLED BY ALIEN ENEMY INTERESTS WITHIN THE MEANING OF THE ALIEN ENEMY ACT; THE TOTAL OF THE STOCK THUS CONTROLLED (DIRECTLY ANY INDIRECTLY) BEING 30,080 SHARES" (pages 222-223; folio 422).

The letter of Heyn and Covington, with *the formal approval* by Hans E. Stoehr, which will be referred to presently and which was *separately offered* and received in evidence as defendants' exhibit G (pages 223-224; folio 424) is printed in full in the appendix to this brief.

Heyn and Lenssen were in Washington in the early days of February 1918 in conference with the Alien Property Custodian. Hans E. Stoehr on February 5, 1918 wrote from Passaic to Heyn, at the Hotel Raleigh, in Washington, a detailed letter regarding the stock ownership of the Botany and enclosed a list of eight papers and documents mailed to Heyn under separate cover, by registered mail, special delivery (defendants' exhibit X, pages 244-245; folios 447-448). Hans E. Stoehr also sent to Heyn, at the Hotel Raleigh in Washington, a further letter, dated February 5, 1918, from the Fifth Avenue office of the New York company (defendants' exhibit H, page 224; folio 425). It appears from Hans E. Stoehr's first letter of February 5, 1918 to Heyn that Heyn and he had been communicating over the telephone and that Heyn had been reporting to Hans E. Stoehr about his interviews with the Alien Property Custodian. At the conclusion of the conferences in Washington, Heyn and Lenssen agreed to put in writing in summary form "the various facts and statements made by them." By February 9th the detailed statement of Heyn and Covington to the Alien Property Custodian had been prepared in New York.

Heyn knew that as a member of the bar he was playing a dangerous game. He took care to commit Hans E. Stoehr in writing to the approval of his firm's letter to the Alien Property Custodian—a most unusual thing for a lawyer to do. The Heyn and Covington letter of February 9, 1918 was signed by Heyn personally (page 126; folio 243). Before the letter thus signed was sent to the Alien Property Custodian a carbon copy of it was formally approved by Hans E. Stoehr on behalf of

the Botany and on behalf of the New York company. The carbon copy thus approved, Heyn retained in his office files (page 126; folio 243; page 223; folio 424).

That formal and official approval by Hans E. Stoehr was as follows:

"THE FOREGOING APPROVED.

BOTANY WORSTED MILLS,

By Hans E. Stoehr
Treas.

STOEHR & SONS INC.

By Hans E. Stoehr
Pres."

Those three words of Hans E. Stoehr on the carbon copy of that letter: "THE FOREGOING APPROVED," were more than an "approval", more than a mere admission. THEY WERE A CONFESSION OF THE REAL INTENT OF THE PARTIES TO THE TRANSACTION.

The letter of February 9, 1918, the formal approval of that letter by Hans E. Stoehr both as treasurer of the Botany and as president of the New York company; the letter of Hans E. Stoehr from Passaic on February 5, 1918, with its enclosures, to Heyn in Washington; and the second letter of Hans E. Stoehr of February 5, 1918, to Heyn in Washington—all demonstrate the utter falsity of all of the essential allegations of the bill regarding the true intent of the contract.

They demonstrate that the contract relied on by the complainant DID NOT EXPRESS THE REAL INTENTION OF THE PARTIES AND WAS NOT AN HONEST CONTRACT OF THE NATURE THAT IT PURPORTED TO BE.

In Hans E. Stoehr's first letter to Heyn he thanked Heyn "for the satisfactory message which" Heyn gave him "over the telephone," and stated that he was enclosing another letter containing the information asked for "in regard to the holdings of stock in the Botany Worsted Mills and Stoehr & Sons Inc."

Hans E. Stoehr also wrote: "In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:—

"Stoehr & Co.	14,900 Shares	
Hirsch & Arnold	4,100 "	
*Various German stockholders	6,400 "	
		25,400 Shares
Stoehr & Sons	5,685 "	
Claimed by Prehn and others	1,205 "	
Various Stockholders in U. S. A.	3,710 "	10,600 "
Total		36,000 Shares

*Including about 1000 shares of Austrian Stockholders."

Hans E. Stoehr accurately referred in that letter to the Leipzig corporation by the name in which it was referred to in the Heyn letter as "Stoehr & Co." A copy of that letter is printed in the appendix to this brief, together with a statement of the enclosures forming part thereof.

Hans E. Stoehr's second letter was:

"Stoehr & Sons, Inc.
200 Fifth Avenue,
New York City.

February 5, 1918.

Herbert A. Heyn, Esq.,
Hotel Raleigh,
Washington, D. C.

Dear Sir:

I herewith wish to state that the majority of the stock of the BOTANY WORSTED MILLS, Passaic, N. J., and of Stoehr & Sons Inc., New York, IS HELD BY PARTIES who are 'alien enemies' under the 'Trading with the Enemy Act'.

This information is given by me as Treasurer of the BOTANY WORSTED MILLS, and as President of STOEHR & SONS INC.

Yours very truly,

Hans E. Stoehr".

The two letters of Hans E. Stoehr to Heyn of February 5, 1918, and Heyn's letter of February 9, 1918 to the Alien Property Custodian, and Hans E. Stoehr's approval of that letter of Heyn, should all be considered together. Yet in his labored attempt to explain away Heyn's letter, counsel for the appellant coolly ignores Hans E. Stoehr's two letters to Heyn (appellant's brief, pages 76-81).

The two letters of Hans E. Stoehr were held by Judge Hand to be conclusive evidence of the intention of the parties. Judge Hand said: "Each was probably intended for transmission to the authorities, and each flatly contradicted the contract of February twentieth, 1917, at least unless it was an option, which, as I have shown, is incredible" (page 316; folios 542-543).

Judge Hand then points out that the statements contained in Heyn's letter were "cumulative upon the earlier reports under section 7(a)", and that "This information was given in compliance with section 7(a), the second paragraph of which requires a statement as of February third, 1917, of all enemy shareholders who the corporate officer had cause to suppose then or later owned any share * * * . The section in addition required him to say what shares were enemy owned, though standing in the name of another when the report was filed. He was therefore positively required to state the character of the relations arising under the contract of February twentieth, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig company had only a vendor's lien, it would have been a wrong upon Stoehr & Sons, Inc. to fail to state its full rights. In saying that the 'control' for purposes of the Act was in the Leipzig company, I may fairly suppose that he had in mind those provisions of section 7(a) under which he was

acting; he used 'controlled' as 'owned'" (page 316; folio 543).

Further, Judge Hand, commenting on the fact that Heyn and Hans E. Stoehr were dead, expressly holds that "THE ASPECT WHICH THE PLAINTIFF SEEKS TO PUT UPON THE CONTRACT IS AN APOCRYPHAL AFTERTHOUGHT, WHICH THERE IS NO REASON WHATEVER TO SUPPOSE THAT THEY, WERE THEY ALIVE, WOULD NOW HAVE THE DISPOSITION, OR THE HARDIHOOD, TO ADOPT. Their declarations ANTE LITEM MOTAM fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates or the United States in its rights as captor. I have no question that the beneficial ownership of the Leipzig shares WAS ALWAYS INTENDED TO REMAIN IN THE LEIPZIG COMPANY" (pages 316-317; folios 543-544).

In spite of the decisive effect that Judge Hand gave to the two letters of Hans E. Stoehr to Heyn, counsel for the appellant in his brief in this Court DOES NOT REFER TO EITHER OF THEM. The reason is obvious. The meaning of the two letters cannot be obscured by any sophistical argument. They are short, clear and decisive. Therefore, counsel for the appellant, unable to explain them away, deliberately ignores them and attempts to explain Heyn's letter ALONE as being consistent with the theory of the complaint.

X

THE EFFORTS OF COUNSEL FOR THE APPELLANT TO EXPLAIN AWAY THE HEYN LETTER

The whole effort of counsel for the appellant (pages 78-83) to explain away the plain words of the Heyn letter is devoid of sincerity and candor. It ignores the full, concrete facts. It is a mesh of wire-drawn theories and technicalities. It is a shirking of a lawyer's intellectual duty to the Court. It is an attempt to smother and to bury the truth under pages of irrelevant discussion. It fails

to meet the real points. It has no rational foundation. It is typical of many other parts of his brief in referring only to fragments of the evidence that he claims support the complaint, and nothing more.

Counsel for the appellant states that under *The Trading with the Enemy Act* subsequently passed the *interests* of the German stockholders in the New York company "could be captured, as in fact they were, *to the same extent* as their partnership interests might have been captured had there been no incorporation" (appellant's brief, page 78). This is a misleading statement. If the assets of the partnership had not been turned over to the company, the capture of the interests of the German partners in the partnership would have given the Government tangible assets, such as money and securities. But the capture of the alien-owned stock of the New York company brought the Government practically nothing owing to the fact that it was held subject to the voting trust agreement running for five years, which prevented its sale. In fact, the only things captured by the Alien Property Custodian from the New York company were the two voting trust certificates, held for the two aliens. The assignment of the partnership assets to the New York company effectually defeated the Government's right of capture of the partnership assets. The voting trust agreement prevented the sale by the Government of the German owned stock of the New York company.

Again, counsel for the appellant states that the "acquisition" by the New York corporation of the 14,900 shares "was likewise intended to conserve the business of the latter corporation and to avoid the mismanagement or waste that might result were the control and management to fall into the hands of a small minority of stockholders" (pages 78-79). "Conserve the business * * * and avoid mismanagement!" For whose benefit? For the benefit of the stockholders of the Leipzig company? No. But for the benefit of the stockholders of the New York company who were the four Stoehrs. The very contract that was to *deprive* the Leipzig company of its most valuable asset was to "conserve" that asset—not for the Leipzig

company, but for the New York company and *its* stockholders. If all of the stock of the New York company had been owned by the Leipzig company, there might have been some plausibility in that "conservation" theory.

Again, stating that it was "doubtful whether, in the event of war, the trustees would have been entitled to vote on the stock which they held in trust for the Leipzig company," counsel for the plaintiff states: "For that reason it was believed that a *sale* by the Leipzig company to the New York company, *which was under the control of* Hans E. Stoehr and Max W. Stoehr, would prevent the dismemberment and possible destruction of the Botany Worsted Mills" (page 79). If that has any meaning, it is merely corroborative of the statement in the Heyn letter that "this contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned". That negatives the idea of an intention to sell and part with the beneficial ownership.

It puts the only possible interpretation upon the acts of the parties and upon the declarations of Heyn that relieves them of the imputation of fraud. The fact that there was *no intention* to transfer the beneficial ownership is shown by the next sentence in Heyn's letter: "Such *status* is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. As we have also stated verbally, there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction." Counsel for the appellant argues that Heyn did not use the word "controlled" in the sense of "owned" (page 82). He seeks to justify that interpretation by arguing that "the *controlling interest* in the stock of the New York company was in German enemies." The whole context of the Heyn letter shows that Heyn referred to beneficial ownership. The Government so understood his letter. Hans E. Stoehr's two letters put the question beyond argument.

Again, counsel for the plaintiff states: "In the event of war and the subsequent enactment of *The Trading with the Enemy Act*, such a transfer would in no wise have interfered with the exercise of the war powers of our Government, the *interests of the German stockholders* in the New York company could have been captured, and any amount owing by the New York company to the Leipzig company could likewise have been captured" (page 79). That statement ignores two vital facts: first, the "interests of the German stockholders in the New York company" could *not* have been *effectually* captured. The only capture that the United States could and did make was of the two voting trust certificates representing the enemy-owned stock. Secondly, "Any amount owing by the New York company to the Leipzig company" could *not* "likewise have been captured", because (a) there was no obligation upon the New York company to make *any* payment until the end of a year and sixty days, and then only upon the delivery of certificates representing one-fifth of the shares, which was impossible; (b) the New York company had no funds or money belonging to the Leipzig company which the Government could seize and use in the conduct of the war; and (c) though the Government did, expressly subject to its prior seizure of the 14,900 shares, demand the rights of the Leipzig company in the contract (page 271; folios 478-479), under that seizure the Alien Property Custodian has in fact received not a penny, for no money was due or made payable under the contract or could be collected under the contract by the Government. The pretense, therefore, that the scheme would or could not hamper the Government in its seizure of alien money and property in the United States, is reduced to an absurdity.

In one breath counsel for the appellant states that Heyn "expressed himself with such clarity" (page 82), and that the motives that prompted the organization of the New York company and the transfer to it of the shares "were stated with entire accuracy" (page 82). But two pages before that he stated that Heyn's letter "was writ-

ten at a period of great stress" and that he "was naturally anxious to exonerate himself and his clients from any imputation that he or they were seeking to circumvent and defeat the right of the Alien Property Custodian to seize enemy property" (page 80). He then states that the Heyn letter "in every way sustains our contention that the transfer was not colorable".

He further states that to say that Heyn "used the word 'controlled' in the sense of the word 'owned' is without justification" (page 82).

Heyn referred to two things in his letter: first, voting control, and secondly beneficial ownership. He said: "The control of Botany might be imperilled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the Courts, and if deprived of the voting right the control of Botany might be lost." There Heyn used the word "control" in the sense of "voting control" and not in the sense of beneficial interest or ownership. He then said: "This contract was made with reference to the control of Botany as between its stockholders". There again he used the word "control" in the sense of voting control. Then he passed to the question of ownership or beneficial interest, and said: "and had of course no reference to the *status* of such control as far as the Alien Property Custodian is concerned." That sentence referred and could, considered in connection with the context, only refer to beneficial ownership, and to nothing else. That conclusion is made inevitable by the very next sentence: "Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation." To say that the word "status" in that sentence meant voting control and not beneficial ownership, is absurd. The Alien Property Custodian was not interested in mere voting control but in *title, ownership and property*. That the word "status" as used by Heyn was meant to refer to beneficial ownership is again shown by the next sentence in

his letter: "As we have also stated verbally there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction."

Finally, the matter is put beyond argument by the summary at the end of Heyn's letter: "While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act." If the word "controlled" in that sentence be held to mean merely voting control, then the statement was false, for the majority of the stock of the Botany, to wit, the 14,900 shares and the 5,690 shares (stated by Heyn as 5,685 shares), was not "controlled by alien enemy interests within the meaning of the Alien Enemy Act", but by the New York corporation which was of course not an alien enemy and was entitled to vote the 20,590 shares.

If the beneficial ownership in the 14,900 shares had passed to the New York company, then Heyn's statement that "more than a majority of its stock is controlled by alien enemy interests" would be false.

Heyn's statement can be justified only by the construction of the word "controlled" to mean beneficially owned. And that is the sense in which Judge Hand construed Heyn's letter.

When Hans E. Stoehr in his first letter to Heyn said: "In addition I give you a list of the stockholders of the Botany Worsted Mills as follows", he meant stockholders in the beneficial sense and not holders of record for purposes of voting control.

In his second letter to Heyn he said: "I herewith wish to state that the majority of the stock of the Botany Worsted Mills, Passaic, N. J., and of Stoehr & Sons, Inc., New York, is held by parties who are 'alien enemies' under the 'Trading with the Enemy Act'." When Hans E. Stoehr referred to the stock of the New York company as being "held by parties who are 'alien enemies' ", he obviously meant beneficially owned. If he meant only "held for voting control", his statement would be false, for it was not "held for voting control" by "parties who

are alien enemies", but by the New York company, which was a stockholder of record of 20,590 shares on the books of the Botany and as such stockholder of record entitled to vote and was not an alien enemy.

Both of Hans E. Stoehr's letters are utterly destructive of the contention that the beneficial ownership in the 14,900 shares was in the New York company. If he had meant that the beneficial ownership of the shares was in the New York company, he would not have written of control at all, for the control would have followed as an incident of the beneficial ownership.

So if Heyn in his statement: "The status of such control so far as the Alien Property Custodian is concerned," and "Such status is not affected," and "More than a majority of the stock is controlled by alien enemies," had not referred to beneficial ownership, they would have been meaningless.

It was only by the beneficial ownership being in aliens that the Alien Property Custodian would have had any right to capture the shares.

Counsel for the appellant further writes: "Looking at the subject from the standpoint of the Alien Property Custodian, he (Heyn) pointed out that the controlling interest in the stock of the New York company was in German enemies and that their interests could be captured by the Government if it so desired, and through such capture not only could the New York company, but the Botany Worsted Mills, be controlled by the Alien Property Custodian" (pages 82-83).

Heyn did not "point out" that the "controlling interest in the stock of the New York company" of the "German enemies" could be "captured by the Government if it so desired", and in fact the only "interest" of the German enemies in the New York company that the Alien Property Custodian could and did effectually capture was the two voting trust certificates, which could not be sold.

Heyn could not and did not "point out" that through the capture of "the controlling interest in the stock of the New York company held by German enemies"

the Botany could be "controlled by the Alien Property Custodian," because that would have been false. On the theory that the contract vested the beneficial interest in the New York company, the voting control would be and remain, not in the Alien Property Custodian, but in the voting trustees of the New York company. Besides, "control by the Alien Property Custodian" was not the vital object of *The Trading with the Enemy Act*, but the capture of enemy property and its sale for the benefit of or its use by the Government of the United States in the conduct of the war.

But the crowning absurdity in the argument of counsel for the appellant is this: "Far from interfering with the belligerent rights of our Government, they were subserved by what had been lawfully done before the declaration of war" (page 83). If that sentence means anything, it means that the beneficial ownership vested in the New York company, and that hence the only things that the Government could seize were the two voting trust certificates held for the two aliens, which could not be converted into money, which could not be used by the Government in the prosecution of the war, and which would not enable the Government to control either the New York company or the Botany company.

Thus it is, to quote the language of counsel for the appellant, that "far from interfering with the belligerent rights of our Government, *they were subserved* by what had been lawfully done before the declaration of war"! The brazenness of those "arguments" is obvious. They are worse than pedantic. They suppress the truth. They pervert the facts.

Heyn was the counsel for the Botany and for the New York company. He had advised Hans E. Stoehr and his associates in connection with the incorporation of the New York company. He had prepared the certificate of incorporation of the company. He had advised with reference to its organization (testimony of Max W. Stoehr, page 112; folio 216). He had prepared the minutes of the stockholders' and directors' meetings, the voting trust agree-

ment and had advised the New York company with reference to the issuance of the stock for the partnership assets (testimony, page 112; folio 216; pages 121-122; folios 236-237) and had prepared the agreement of February 20, 1917. His letter was therefore an admission by counsel of the company, who was the engineer of the whole scheme, as to the intention of the persons concerned in the attempt to save from capture the $6,000,000 asset of the Leipzig corporation by means of the sham contract with the New York company.

Heyn added that the contract "had of course no reference to the STATUS OF SUCH CONTROL so far as the Alien Property Custodian is concerned" (page 222; folio 422). But if the contract was what it purported to be, and the intention of the parties was what the contract attempted to show their intention to be, the contract would have had a most decided effect upon "the control of the Botany *as far as the Alien Property Custodian was concerned*".

If the contract was what it purported to be on its face, the control of the Botany would be in the New York corporation, and the Alien Property Custodian would have no direct control whatever over the Botany.

Heyn as a member of the bar doubtless felt that he dare not in his letter of February 9, 1918, admit or confess that *the whole contract was a sham*—that the New York parties to it did not mean what upon its face it said. To have admitted that the whole thing was a sham, as it undoubtedly was, would have been an admission by him as a member of the bar that he had advised and engineered a scheme for the purpose of defeating a law or laws of the United States that was or were certain to be enacted upon the outbreak of war. So he made statements of *the record* facts accurately, and made an explanation of the contract that was essentially a confession *that the whole contract was a sham* but that saved his face by reading into it an intention limiting it only *to voting control.*

But he did more than that. He was daring to the last. For his letter adroitly *concealed* any *specific reference* to the voting trust agreement and *concealed* the fact that it

was a *five-year voting trust* agreement and that the three voting trustees were the two Stoehrs and Roehlig.

Heyn's letter must be taken to mean that, contrary to what the contract purported to be on its face, the real intention was to preserve the beneficial ownership of the stock for the Leipzig corporation, an alien enemy of the United States.

Heyn, the member of that firm who was the engineer of the scheme, is dead.

It is not conceivable that he would have dared to appear in this Court and have the audacity to assert that the contract transferred, and was intended to transfer, *honestly and without reservation* the beneficial ownership of the shares from the Leipzig corporation to the New York corporation, *and that Hans E. Stoehr had authority to act for the Leipzig corporation.*

If Heyn, with his knowledge of the facts and in spite of his admissions and written statements, had advised the complainant to do what the complainant has done in this case, if under Heyn's advice the complainant had sworn to the bill and testified as the complainant has in this case, Heyn would have been guilty of the grossest kind of professional misconduct. Had he been mad enough to do such a thing, he would have laid himself open not merely to disbarment proceedings but would have been guilty of subornation of perjury and of conspiracy.

Hans E. Stoehr, who was one of the two chief actors in the transaction under the guidance of Heyn, is also dead. It is likewise inconceivable that Hans E. Stoehr, had he lived, would have dared to go on the stand and testify in the way that Max W. Stoehr attempted to swear this case through as to the *implied* authority of Hans E. Stoehr, or that Hans E. Stoehr would have dared to swear to a bill the very essence of which was that the contract of February 20, 1917 was an honest and *bona fide* contract. Had Hans E. Stoehr lived, and had he sworn to such a bill, he would have been clearly, under his letters to Heyn, indictable for perjury. *Manet litera scripta!*

Though Heyn and Hans E. Stoehr have gone, their words, their declarations, their admissions, their confessions, remain, and the contrast between those written words and the brazen testimony of Max W. Stoehr is too glaring to call for further comment.

The Real Motive of the Letters

Up to this point we have considered the Heyn letter and its interpretation by counsel for the plaintiff without regard to the facts leading up to it and the motives that impelled the writing of it. Two crucial periods of time are involved here. The first is February, 1917, when the contract was made and the elaborate *paper* scheme carried out to bury the German interests in the New York company beyond the reach of effective capture. The next crucial period is February, 1918.

In the meantime *The Trading with the Enemy Act* had been passed. That Act required the Stoehrs to make reports of all the alien interests of all and every kind and nature held by them or by corporations of which they were officers. Max W. Stoehr swore to three reports to the Alien Property Custodian:

(1) The report of the New York corporation which was sworn to December 6, 1917.

(2) The report sworn to December 3, 1917 of the interests owned by Eduard Stoehr.

(3) The report sworn to December 3, 1917 of the interests of the alien enemy Georg Stoehr.

Max W. Stoehr suppressed material facts in those reports and laid himself open to prosecution under the provisions of the Act.

None of those reports contained *any reference to the contract.*

Those reports reveal a deliberate intention on the part of Max W. Stoehr to deceive the Government. But the truth came out—not from Max W. Stoehr or from

Hans E. Stoehr or from Heyn—but from a report made by Prehn, the president of the Botany, in which Prehn made a statement regarding the 14,900 shares and the fact that the Botany "had reason to believe that Stoehr & Company, a corporation of Leipzig, had an interest under contract" in those shares. THAT STATEMENT OF PREHN STARTED THE INVESTIGATION IN WASHINGTON. It led to the inquiry for facts, and then Heyn and Hans E. Stoehr and Max W. Stoehr realized where they were and that Max W. Stoehr WAS IN DANGER OF PROSECUTION UNDER THE ACT.

No change of heart had come over these two Germans or Heyn between February 1917 and February 1918. When, in December 1918, Max W. Stoehr swore to those three reports, he had the same intention that he had in February, 1917. But when the three—the two Stoehrs and Heyn—realized that the facts must come out, then they wanted to confess, they were eager to confess, not because of a change of heart, but because by a confession they might save Max W. Stoehr from prosecution.

Because Max W. Stoehr had suppressed material facts, his brother Hans E. Stoehr was put forward to explain things, through Heyn and Lenssen, to the Alien Property Custodian. Max W. Stoehr was then kept in the background. Hence Hans E. Stoehr's anxiety while Heyn was in Washington. Hans E. Stoehr thanks Heyn "for the SATISFACTORY MESSAGE which you gave me *over the telephone* reporting about your interview at the Department of the Alien Property Custodian".

An analysis of Max W. Stoehr's three reports and of the separate report of the Botany by its president Prehn, is contained in the appendix to this brief for convenience of reference.

That Heyn's attempt thus to explain the contract was misleading, is demonstrated by the fact that as part of the same transaction all of the stock of the New York company, which company on the stock books of the Botany became the record holder of 20,585 shares (defendants' exhibit Y, pages 245-248; folios 449-450) was placed under a voting trust agreement to run for a period of five years (plain-

tiff's exhibit 5; pages 197-199; folios 365-370). Heyn did not explain how such a voting trust agreement was necessary "in reference *to the control of Botany as between its stockholders*". He asserted that the contract "had of course no reference to the status of such control so far as the Alien Property Custodian is concerned".

BUT HE CAREFULLY CONCEALED THE FACT that the stock of the New York company was under a five-year voting trust. In connection with his "explanation" of the capital stock of Stoehr & Sons, Inc. he wrote, referring to the partnership of Stoehr & Sons:

"It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien-enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously *unfortunate and conceivably disastrous*".

And then he wrote:

"The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1875 shares, Geo. Stoehr, the brother, 222.21 shares (*being represented by trust certificates* held by M. W. Stoehr for his father and brother)—in other words somewhat more than 4/5ths interest in parties resident in Germany".

Obviously the reference by Heyn in his letter to "trust certificates" was put in to save himself from the charge of a suppression of material facts and to tuck away in the letter an obscure self-justifying phrase, if he should ever be called upon to explain the existence of the five-year voting trust agreement.

The Law

A government at war may confiscate in accordance with its own laws and rules of procedure any property belonging to an enemy alien found within its territory. The only

question is whether such property belongs to an enemy alien. In determining the ownership of such property the seizing government is not limited in its rights by the apparent ownership of the property, but determines the actual ownership. If the *beneficial ownership,* open or secret, of property is actually in an alien enemy, the government may seize the property as enemy alien property *whatever the apparent ownership and whatever the legal title.* The authorities for these propositions need not be quoted to this Court.

That principle of law is the basis of *The Trading with the Enemy Act,* and is assumed by that *Act's* existence. The *Act* itself, Section 7, subdivision (c) reads as follows:

> "(c) If the President shall so require, any money or other property *owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of,* an enemy or ally of enemy not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing, or so belongs, or is so held,* shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

This suit is brought under Section 9 of the Act, and in it must be determined who is the *real owner* of the 14,900 shares. The rules for determining that ownership, in the case of property alleged to be enemy-alien owned, do not differ in substance from the rules which guide Courts in determining whether ANY OTHER TRANSACTION IS OR IS NOT IN FACT WHAT IT PURPORTS TO BE.

Those rules involve a consideration not only of the transaction itself but of all the surrounding facts, including in the case of conveyances or contracts in contemplation of war or in contemplation of bankruptcy, the connection in point of time and other circumstances between the particular contract or transaction and the act of war or bankruptcy, as the case may be.

The Courts invariably look beyond the form of the transaction to its substance. They are not limited by

mere technicalities such as whether or not the legal title was transferred and whether or not to hold the beneficial ownership in one person would necessitate contradicting the terms of a written instrument. The essential, almost the controlling, question which the Courts ask in determining whether a transfer of property is a real transfer of beneficial ownership of the character which it purports to be or is merely a colorable transfer for an ulterior purpose, not expressly stated, is WHETHER THE TRANSACTION IS OF SUCH A CHARACTER AS TWO PARTIES BEARING THE RELATION TO EACH OTHER THAT THE PARTIES TO A CONTRACT ACTUALLY DO BEAR, WOULD MAKE, IF THERE WERE NO SUCH ULTERIOR PURPOSE.

That is the real test. All rules as to particular parts of a transaction which must be especially examined are merely illustrations of the application of that general principle. Among such subsidiary well-known rules are the following:

(1) The known inability of the purchaser to pay for his purchase.

(2) Continuation of the seller's interest in the property.

(3) Retention by the seller of any control over the property.

(4) Unusual haste.

(5) Unusual length of credit.

(6) Excessive effort at regularity.

(7) Extraordinary insufficiency of the consideration, or obvious inequality of the contract with respect to its benefits and burdens.

There must always be taken into consideration the motives which the parties might have and the possible benefits which they might obtain from making the purported transaction different from the reality; that is to say, benefits that would be derived by either party from concealment of the true purpose.

There are many authorities and many decided cases, *especially in equity,* in which the true nature, purpose

or object of the transaction has been shown, even though such evidence may apparently contradict the writing, as to the consideration, object or purpose thereof. Courts have repeatedly admitted evidence that notwithstanding formal writings, declarations, resolutions or testamentary papers there was never any contract, agreement, corporate action or testamentary disposition at all. We have referred to a few of the decisions and authorities in support of this fundamental principle in the appendix, and have included among them a digest and consideration of the case of *Fleming v. Morrison,* 187 Mass. 129 (1904), which is very much in point in the case at bar. That case involved a will witnessed by two persons when the fact was that the nominal testator had told one of the witnesses that he was making the will in order to induce the beneficiary to let him sleep with her. The Court held that what had been done in the making and witnessing of the will was a sham and that there never was any will or testamentary intent at all.

Many of the rules relating to fraudulent conveyances are applicable to the case at bar.

In 20 *Cyc,* page 439, under the title "Badges of Fraud", a number of circumstances which are *indicia* of fraud are set forth as follows:

> "There are circumstances so frequently attending conveyances and transfers intended to hinder, delay and defraud creditors that they are denominated badges of fraud. These badges of fraud do not in themselves or *per se* constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence. They are more or less strong or weak according to their nature and the number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice. * * *
>
> "The fact that the consideration of a conveyance is fictitious in whole or in part is evidence of fraud. * * *

"Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud, especially when such inadequacy is gross. * * *

"*If a transfer is made by a debtor in anticipation of a suit against him, or after a suit has been begun and while it is pending against him, this is a badge of fraud;* but the pendency of a suit will not overturn a conveyance made in good faith and for value. If a conveyance is made pending a suit against the grantor, for the purpose of preventing the collection of such a judgment as may be recovered, and with knowledge of the grantee that it is so made, it will be set aside at the instance of the plaintiff in such suit after judgment for him therein, whether made with or without a valuable consideration. A transfer pending an action of tort against the grantor with intention to defeat the collection of any judgment that may be recovered in such action, is fraudulent, even though snch transfer is made for a valuable consideration, if the grantee had knowledge of, or participated in this purpose. It is a badge of fraud that a conveyance was made after the rendition of a verdict in favor of a creditor and while a stay of proceedings was in force. * * *

"The giving of an absolute conveyance which is intended to operate only as security is held to be a badge of fraud, and some of the cases hold such a conveyance conclusively fraudulent as to existing creditors. * * *

"Secrecy is a badge of fraud; *and so is undue or unusual haste a badge of fraud.* Secrecy is a circumstance which may give force to other evidence and from which in connection with other facts fraud may be inferred. * * *

"The mere fact that a sale is made upon credit does not require that the transaction should be declared invalid; but a sale upon credit of part of his property by an insolvent debtor is a circumstance which may be considered with others as bearing upon the question of fraudulent intent; and *an unu-*

sual length of credit is a badge of fraud. So, too, the giving of long credit to an irresponsible purchaser without security has been considered to be a badge of fraud. * * *

"*Circumstances indicating excessive effort to give the transaction the appearence of fairness or regularity,* which are not usually found in such transactions, are to be regarded as badges of fraud. * * *

"The unexplained retention by the grantor of the possession of the property transferred is a badge of fraud. * * *

"The reservation of a trust or benefit for the grantor is generally a badge of fraud. * * *

"Badges of fraud are repelled by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent than if such badges of fraud did not exist. Where numerous signs or badges of fraud exist, it is incumbent on the party seeking to uphold the transfer to meet and overcome them."

Among the cases cited in *Cyc* are the following:

Baldwin vs *Short*, 125 N. Y., 553: An action was brought by an assignee for the benefit of creditors of a firm to set aside a deed executed by one of the defendants, a member of the firm, to another defendant, as fraudulent and void as against creditors. The conveyance was not voluntary, but was made in part in consideration of a debt which was justly due to the grantor from the grantee. The conclusion of a fraudulent intent on the part of the grantee was therefore essential to recovery and it was established by proof that the balance of the consideration for the transfer was made up of a false and pretended debt. It was held:

(1) That when a deed is fraudulent against creditors, it is wholly void; although a portion of the consideration expressed was in fact paid by the grantor, it cannot stand as security or indemnity for that portion.

(2) That when, however, the fact of such payment appears, it is necessary, to sustain an action to set aside the deed, to prove a fraudulent intent on the part of both the grantor and the grantee.

(3) That evidence of conveyances by the grantor to other persons than the grantee prior to the one in question is competent as bearing upon the intent of the grantor; and they may not be excluded because they do not bear upon the intent of the grantee.

In *First National Bank* vs *Miller*, 163 N. Y., 164, a judgment creditor's action was brought to set aside a conveyance by one of the defendants to his daughter of certain real estate and also a bill of sale of certain personal property made between the same parties. The transfer was made by the father, while he was insolvent, to his daughter who resided with him and who was a member of his family. The value of the property transferred exceeded $45,000, while the consideration, with the exception of a small amount of a trust indebtedness due from him to her, did not exceed $38,000, of which $1,000 was not a valid obligation. By the transfers the father stripped himself of all his property, which fact was known by his daughter, and they were made about a month before the maturity of a note for a large amount of money made by him, and there was no change of possession of the personal property transferred. It was held that the transfers were made by the father with intention to hinder, delay and defraud his creditors.

In *Fuller* vs *Brown*, 76 Hun, 557, it was held that while the want of a valuable consideration was not alone sufficient to sustain a charge of fraudulent intent in the transfer of property, it was an important fact in that direction that the transfer embraced substantially all the property of the debtor, and left him without means to pay what he owed, and in such a case his voluntary conveyance was controlling evidence of fraud against his then existing creditors.

In *Young* vs *Heermans*, 66 N. Y., 374, an action was brought by the plaintiff as judgment creditor to vacate

and set aside certain conveyances or deeds of trust made by one Fellows to one of the defendants, as fraudulent and void against creditors. It appeared that the transfer was made by the debtor of all the property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts. It was held that that was *per se* conclusive evidence of fraud as to existing creditors, and that no extrinsic circumstances or evidence *aliunde* was necessary to establish a fraudulent intent.

Among the elements to be taken into consideration in determining whether or not a transaction which purports to be a sale is a real transfer of interest from the seller to the buyer, or only a pretended one, the cases lay down as of primary importance the question whether the seller still retains any substantial control over the property purported to be sold. The opinion of the Court in one early English case went so far as to lay down the rule that the retention *in the seller's trade* of the property to be sold raises a presumption that the transfer is merely a covered and pretended transfer "so strong that scarcely any proof can avail against it". That case was

1801, The Jemmy, 4 C. Rob. 31, op. Sir W. Scott,

which was of a ship asserted to have been purchased of the enemy by a neutral. The Court gave judgment condemning the vessel. The opinion of the Court reads in part as follows:

> "This case has been admitted to farther proof owing entirely to the suppression of a circumstance, which, if the Court had known, it would not have permitted farther proof to have been introduced; *namely, that the ship has been left in the trade, and under the management of the former owner.* Wherever that fact appears, the Court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can

avail against it. It is a rule which the Court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship and yet retain the management of it, as a neutral vessel, it would be impossible for the Court to protect itself against frauds.

"The positive objections which have been pointed out, on the fact of transfer, are also of considerable weight: the inadequacy of the price, *and the chasms appearing in the correspondence, are circumstances inconsistent with the probability of ownership;* there is also the course of trade, which has been entirely French, without interruption, excepting in one voyage to Barcelona; but even in that instance, the vessel returned again to a French port."

In the light of the principles laid down in *The Jemmy* case, let us consider the following facts: Prior to February 20, 1917, while the Leipzig corporation was the actual owner of the 14,900 shares which the contract purported to transfer to the New York company, the holders of the legal title were the brothers Stoehr, resident in New York City, or Passaic, New Jersey. They held the stock as trustees. Hans Stoehr was a native German, unnaturalized. Max Stoehr was a native German but naturalized. Their father, Eduard Stoehr, and their brother, Georg Stoehr, were both native Germans, resident in Germany on February 20, 1917 and subsequently. Hans E. Stoehr and Max W. Stoehr were therefore deemed sufficiently trustworthy and capable to have entrusted to them by the Leipzig corporation the voting power upon that stock.

At the annual stockholders' meeting of the Botany held in March, 1916, the 14,900 shares of Botany were voted as follows: by Hans E. Stoehr, "trustee, voted in person", 10,000 shares, and by Max W. Stoehr "trustee, voted in persons," 4,900 shares (defendants' exhibit Y, pages 245-248; folios 449-450).

At the next annual meeting of Botany stockholders held in March, 1917, after the purported transfer, the same shares were represented, and "Stoehr & Sons, Inc. voted

in person 20,585" (defendants' exhibit Y), by Hans E. Stoehr and Max W. Stoehr, who were the officers entitled to represent Stoehr & Sons, Inc. in person.

And at the annual meeting of March 18, 1918, "Max W. Stoehr as proxy for Stoehr & Sons, Inc." again represented the 20,585 shares (defendants' exhibit Y).

The transfer therefore of the shares from the Leipzig corporation to the New York company was not, when the actual facts are considered, a transfer *of the control of the shares.* They still remained after the purported sale to the New York company subject to the direction and control of Hans E. Stoehr and Max W. Stoehr *precisely as they had been when they were owned by the Leipzig company* but held for the Leipzig company by Hans E. Stoehr and Max W. Stoehr as trustees. When we consider that the terms of the purported contract were such as no two persons dealing at arms length could possibly intelligently make with each other, do not these facts, connected with the fact that the same persons controlled the stock and its disposition after the purported sale as before, necessitate the conclusion, under the principle of *The Jemmy case*, that the transfer was not a real one but, as stated in the opinion of Sir W. Scott, "*merely a covered and pretended transfer*?"

To the same effect is

1805, The Omnibus, 6 C. Rob. 71, op. Sir W. Scott,

which was against a ship claimed to be the property of a neutral but apparently by the evidence British property trading with the enemy. The Court gave judgment condemning the ship as guilty of trading with the enemy. The opinion reads in part as follows:

> "The Court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, *not all the swearing in the world will convince it that it is a genuine transaction.* The present case has none of the marks of a real transfer upon it".

An instructive case on this general subject is

1799, The Heydt Gedacht, 2 C. Rob. 137,

which was the case of a small Dutch fishing vessel transferred to a neutral claimant under a condition to reconvey it at the end of the war. The opinion reads in part as follows:

> "A sale made by an enemy to neutrals in time of war, must be *an absolute unconditional sale*: This transfer is evidently done in order to cover the property during the war. The vessel continues in the old trade, and is in every respect a Dutch vessel".

The contract in the case at bar imposed upon the buyer *no obligation* to "re-transfer" the shares to the seller at the close of the war, but the conditions of the contract are such that if the buyer were friendly to the seller and wished merely to hold the property during the continuance of the war and legally re-transfer it to the seller when the war should be over, he could readily do so under the terms of the contract, and the seller of course would gladly welcome the re-transfer.

The contract was clumsily designed to permit the buyer to act as trustee in fact if not in name for the seller and was intended to enable the seller to take back the property at the close of the war, without any obligation arising on the part of the buyer with respect to paying for the stock, and without the seller being able to hold the buyer legally in any manner whatever, in case the buyer did not wish to consummate the transaction as an actual sale.

The contract was obviously designed to permit the purported buyer to protect the interest of the seller during the continuance of war, *and then enable the seller to take back the property when the war should be over,* without any possibility of the buyer becoming in any way liable for the purchase price of the stock, and with the buyer having the right to receive a large sum of money in cash as dividends on the stock, to be also returned to the Leipzig cor-

poration the same as the stock. While the seller did not nominally retain any control over the voting right in the shares, and while the New York company was vested with the voting rights carrying the control of the Botany and with the right to receive the dividends declared and paid thereon, the buyer by merely declining to pay any of the instalments under the contract would allow the seller to take back the property when the proper time should arrive.

Although the contract provided on its face that in such a case the New York company should not be accountable to the Leipzig corporation for the dividends received by the New York company, it would be preposterous to contend that, considering the relations of the two Stoehrs in this country and of their cousin Roehlig, to the Stoehr family and to the Leipzig corporation, the New York company would not pay back the dividends also. In the light of the facts, that provision of the contract was a mere sham, put into the contract for the purpose of giving it a color of regularity, and the dividends were intended to be held and paid to the Leipzig corporation just as the stock was intended to be re-transferred to the Leipzig corporation, when the danger of capture was over and the war had passed.

Again, that THE INABILITY OF THE BUYER TO PAY THE PURCHASE PRICE is an important fact tending to show lack of good faith in the transfer is laid down in *The Proton, 87 Law Journal (Admiralty 1915) 114.* That was a writ of condemnation against *The Proton* as an enemy vessel.

The Proton had been purchased by the appellant Kouremetis April 1915 and duly registered as a Greek vessel. On July 27, 1915 a writ of condemnation was issued against the vessel as a good and lawful prize. One of the questions involved was whether the vessel was really owned by the purported owner, Kouremetis, or whether the real owner was the German government.

The Court held that the real owner was the German government, basing its conclusion largely upon the fact that the purported owner, Kouremetis, although he paid cash for the vessel, was not a person of any financial

responsibility, and that the evidence tended to show that the money must have been furnished him by some other person, which other person in view of his enemy associations the Court held was probably the German government. The appeal was dismissed on the ground that whether or not the German government was the real owner, if the Court were correct in assuming that Kouremetis was not the real owner, Kouremetis had no standing in Court, because only as an actual owner would he have any such standing. The opinion of the Appellate Court reads in part as follows:

> "The learned Judge disbelieved the appellants' case and on the evidence found (1) that Michael Kouremetis had no means of his own with which to buy The *Proton;* did not buy her and was not her owner; but only figured as her owner in order that she might continue to fly the Greek flag as a convenient but dishonest device. (2) that in view of his enemy associations he must have bought her with German money; (3) that only the German government could have been concerned in laying out so much money on the ship in order forthwith to hazard her in so dubious and dangerous an adventure; (4) that as Michael Kouremetis was no seaman he would only have been on board to look after the interests of the German government, his employer. If the learned Judge's first finding is right, this appeal fails, for Michael Kouremetis had no character except that of owner in which he could claim to have the ship released to him, and if not her owner has no *locus standi* to criticize or complain of her condemnation".

It is not necessary to repeat here the facts which demonstrate the financial inability of the New York company to carry out a $6,000,000 stock purchase when it was a concern with comparatively small assets, with scarcely any available banking assets, and with no bank to lend any money to it to consummate the purchase of *shares the cer-*

tificates for which were physically in Germany and could not be received from Germany until after the war.

Again the fact that UNUSUAL HASTE IN A TRANSACTION TENDS TO SHOW THE TRANSACTION A COLORABLE ONE is also well established. For example such was the decision in *Shaungut v. Udall, 93 Ala. 302,* which was an application to set aside a sale of goods as made, to the knowledge of the buyer, with intent to hinder, delay or defraud the seller's creditors. The case really turned on whether the buyer had notice of such intent on the part of the seller. The Court held that the unusual haste of the transaction was a circumstance tending to show that the buyer had such notice. The point of the case really was that a transaction characterized by unusual haste thereby becomes suspicious and will be scrutinized by the Court much more closely than otherwise, and a greater burden arises upon the parties to explain the transaction as one made in good faith.

In the case at bar the extraordinary haste of the parties appears at many points and especially from the fact that the Leipzig corporation's name was affixed to the contract without any previous communication with the Leipzig corporation or any previous authorization. Hans E. Stoehr and Max W. Stoehr were bare trustees of the record title of the shares on the books of the Botany, and were not trustees generally for the Leipzig corporation.

To the same effect upon the question of undue haste is the case of *Bendetson v. Moody,* 100 Michigan 563.

As to when UNUSUAL TERMS OF CREDIT WILL BE HELD TO BE A BADGE OF FRAUD, it has been held that where a contract would be open to legal objection if not in good faith intended to be what it purports to be, the fact that an unusual term of credit was given tends to show that the contract was not made in good faith. This is well established.

A decision to that effect is *Borland v. Walker,* 7 Ala. 269, where an insolvent, with judgment in force against

him and others about to be obtained, sold to his father-in-law his entire estate, reserving his household furniture, and providing by the contract of sale for the payment of only a portion of his debts, giving the buyer a credit for the residue of the purchase money, the first payment of which was to fall due in seven years and the last in twelve. The Court held such a transfer would be presumed to be in fraud of the alleged seller's creditors, unless the suspicious circumstances of the extreme length of credit were satisfactorily explained and the contract shown to be *bona fide.*

In the case at bar no satisfactory explanation whatever appears of the extension of the terms of credit over five years. As shown by the Heyn letter, 1205 shares were bought and paid for in 1916 by stockholders resident in the United States. No reason was shown by the plaintiff why the 14,900 shares could not have been sold for cash. The Court will doubtless take judicial notice of the fact that it is abnormal, to say the least, to give five years' credit on the sale of a majority stock interest in a large corporation.

As a matter of fact a *bona fide* sale of this stock on February 20, 1917 could not only have been made for the then book value of the shares, *in cash,* but that purchase price could then *easily* have been transmitted to the seller in Germany before war actually existed between Germany and the United States. Why then, when the Leipzig company could have made a sale of the stock for substantially the same purchase price, *payable presently in cash,* with immediate delivery to the purchasers, should it give credit extending over five years to a purchaser, who purchased without any obligation to pay for the stock if he should elect not to take it?

Any time during the month of December, 1916, or during January or February or March, 1917, it was perfectly easy to communicate by wireless with Germany, and to receive wireless communications from Germany. (Evidence summarized in appendix.)

It was perfectly easy during all those weeks for the Leipzig corporation *to assign* its interest in the shares to an American purchaser or group of purchasers, to have

sent by wireless notice of such assignment to any purchaser or group of purchasers and *to have sent the physical certificates, duly endorsed* by the Leipzig company, to any one of a hundred bank correspondents of perfectly well-known American banks in either Switzerland, Holland, Denmark, Norway or Sweden.

The Court will recall that Article XVIII of the by-laws then in force provided that the certificates abroad "may be deposited, properly endorsed, with * * * any director resident at Leipzig, who is to *certify* such transfer or assignment to the treasurer at the principal office of the company, and the treasurer shall thereupon note such transfer upon the share book of the company *and advise* * * * such director at Leipzig of the transfer so made."

Two things are to be observed regarding that provision: First, the director in Leipzig was *not* required to "certify such transfer" IN WRITING, and hence he could easily send such a certificate by wireless. Secondly, the treasurer of the Botany company was *not* required to "advise * * * such director at Leipzig of the transfer so made" IN WRITING. Hence the Botany treasurer could at any time during those weeks have sent his "advice" of the transfer on the books of the Botany by wireless to the director in Leipzig.

It is common knowledge that transactions involving many millions of dollars were carried out during those weeks between persons in this country and persons in Germany. Many hundreds of sales of stock were consummated *by wireless* at that time, and other much larger transactions were consummated *by wireless* later during those very weeks. (See evidence summarized in appendix.)

An American purchaser or a group of purchasers of those shares would have paid their money for the shares upon a wireless communication from any American bank's correspondent in any of those adjacent neutral countries to such a purchaser or to his or their bank in this country, with the usual cable test, that such bank had received said shares *endorsed by the Leipzig company* for account of the American purchaser. That would have made the transaction complete.

And finally, it was perfectly possible and legal for any bank in any of those neutral countries to send the physical certificates representing those shares to an American purchaser, even after war was declared between the United States and Germany.

Again, that EXCESSIVE ATTEMPTS AT REGULARITY RENDER SUSPICIOUS A CONTRACT which would be invalid or subject to legal objection if not in good faith, is also well settled.

An illustrative authority to that effect is 1865, *Loeschigk v. Addison*, 19 Abb. Pr. 169, in which the opinion was by McCunn, J. in the New York Superior Court. This was an action to set aside as fraudulent and void certain transfers of property. The Court set aside the transfer, holding that the excessive regularity of the transaction was an element tending to show its bad faith. The opinion was in part as follows (page 180):

> "The bill of sale was not truthful. It professed to be a sale as for a cash payment, and recited dollars and cents, so as to give it the color of a business transaction. The precise motive of the prompt removal of the stock to another store is not explained, but it looks very like a precaution to avoid the presumption of fraud, which attaches to a transfer by a debtor in failing circumstances if unaccompanied by a change of possession. *Considering that the transaction was between confidential friends, father and son-in-law,* that Addison Brothers had no longer an existence or need of a store, this prompt change of location, with *the careful notice of the fact in the agreement pledging the choses in action,* is like that overcaution which is one of the settled *indicia* of fraud, which EVINCED A DIFFIDENCE IN THE RECTITUDE OF THE TRANSACTION AND EXCITES A CORRESPONDING SOLICITUDE TO PROVIDE DEFENCES FOR ITS PROTECTION".

Let us apply the principles enunciated in the opinion of Judge McCunn to the case at bar. The contract does not appear on an analysis to be what on its face it purports

to be. It was drawn with seeming care to give the appearance of an actual sale for an actual purchase price. A careful analysis however discloses that the purchase price need never be paid, but that the buyer could at any time default, with only the penalty of losing the right of further ownership of the stock purported to be sold, and forfeiting an initial credit of $5,000, a mere bookkeeping entry. Against that possible loss was the certain gain to the buyer of at least one year's dividends on the stock amounting to over $250,000.

There was also in the contract excessive care to provide that the shares purported to be sold should be "forthwith" TRANSFERRED into the name of the New York company. That transfer was provided to be made before any payment other than the initial $5,000 bookkeeping entry on a purchase price which upon the known condition of the Botany would amount to upwards of $6,000,000. What possible purpose could there be in making that transfer "forthwith" when not a dollar of the purchase price had been paid; or on the basis of the bookkeeping entry, only one-tenth of one per cent of that enormous purchase price had been paid, EXCEPT TO GET THE LEGAL TITLE TO THE STOCK OUT OF THE NAMES OF TRUSTEES FOR A GERMAN COMPANY? This element of the case is similar to that provision in the *Loeschigk case* of the removal of the property. In each case the parties were really providing for an anticipated attack upon the good faith of the transaction.

This leads to a consideration of the facts in the light of the decisions above cited.

(1) The contract was made in great haste, without any previous communication with the Leipzig corporation, although communication by wireless was perfectly feasible during those months.

(2) The assets of the New York company on February 20, 1917, did not indicate any reasonable prospect that the New York company would be in a position on February 20, 1918 to pay the first instalment. It had almost no cash on hand. Its assets were of a character not easily

liquidatable except at a loss. The Botany stock owned by the New York company was not listed. The certificates representing the 5690 shares were not in this country and hence could not be pledged for money to enable it to pay the purchase price of the 14,900 shares.

(3) The terms of credit were extraordinarily long, without any sufficient reason appearing for such length of credit, provided the transaction were in good faith. The selling price of the stock was over $300 a share and the stock could have been readily sold for that amount among the persons acquainted with its value. As a matter of fact other sales of Botany stock *for cash* had been made shortly prior to that period (Heyn letter, defendants' exhibit F, pages 218-223; folios 417-423). There is no doubt that the entire amount of Botany stock could have been sold at the price provided for in this contract, but in cash payable immediately. This fact in itself is sufficient to throw doubt on the transaction.

(4) A sale of such a large block of stock, which enabled the vendee to become the majority owner of the entire stock of the company, without any allowance whatever for good will, would have been a palpable fraud upon the Leipzig company. Max W. Stoehr himself admitted the elements that go to make up a valuable good will in such a company, but no testimony was needed to show that a sale of stock in a concern like this on a mere "hard assets" basis, without any allowance whatever for good will, was not such a sale as business men would make unless it was accompanied by some secret intention or understanding or expectation of future action, not disclosed in the contract.

(5) Had the contract not been made the shares would, upon the declaration of war, which was admittedly imminent, and the enactment of *Enemy Trading legislation*, have become seizable by the United States. The transfer of the title to the shares to the New York company, if sustained as a *bona fide* transaction, would place it out of the power of the Government to seize these shares as enemy

owned and the Government would be remitted to a claim for payment in five annual instalments, NOT ONE OF WHICH WOULD EVER BE DECLARED DUE.

There was therefore an actual deprivation to the United States Government of a very substantial part of the beneficial interest in the shares if the transaction were to be sustained, for the government would have the right merely *to the purchase price deferred over a period of five years,* or, as the successor in interest of the seller, the Leipzig company, would have the right to put the New York company in default, and upon such default to retake the shares. NEITHER OF THESE ALTERNATIVES WOULD BE OF ANY BENEFIT OR ADVANTAGE TO THE LEIPZIG COMPANY, *if the contract were what on its face it purported to be.* The only conceivable benefit that there could be to the Leipzig company in or from the contract WOULD BE A BENEFIT COMING FROM A SECRET INTENT IN CONNECTION WITH IT.

(6) On the face of the contract the ownership and control of the Botany would remain in the friendly hands of the directors of the New York company. The relations between the directors of the New York company and the stockholders of the Leipzig company were such as to make it perfectly practicable and simple for them to carry out a secret understanding to hold the shares so transferred and the dividends upon the shares, really in trust for the Leipzig company and to account for them to the Leipzig company when the war should be over.

That would be the natural and probable result of the transaction, even without assuming a secret understanding.

(7) There was no change in the control of the property. Before the sale, the two Stoehrs in New York, as Trustees of the 14,900 shares and as members of the partnership, controlled the Botany. After the sale, the Botany was controlled by the New York company, and the New York company was controlled by those two same Stoehrs.

(8) The contract would have benefited the New York company at the expense of the Leipzig company to the

extent of some $525,800 in dividends (defendants' exhibit B page 234; folio 439) within about fourteen months, without any *expressed* compensating advantage to the Leipzig company.

We must assume that the benefits and burdens of the contract were intended to be in some extent correlative. Neither party would be presumed to have imposed upon itself a burden without some sort of a compensating benefit, a benefit which might under reasonable circumstances be deemed as of some compensating value.

But the transfer to the New York company of the right to take and to keep over $500,000 in dividends, without any payment therefor, other than a mere bookkeeping credit of $5,000, had no expressed or apparent compensating advantage to the Leipzig company.

IT IS A NECESSARY INFERENCE THAT EITHER THERE MUST HAVE BEEN SOME SECRET BENEFIT INTENDED TO THE LEIPZIG COMPANY, NOT EXPRESSED IN THE CONTRACT, OR THAT THE NEW YORK COMPANY WAS NOT INTENDED TO BE THE REAL OWNER OF THE DIVIDENDS WHICH IT SHOULD RECEIVE, BUT WAS INTENDED TO HOLD THEM IN TRUST FOR THE LEIPZIG COMPANY AND TO ACCOUNT FOR THEM TO THE LEIPZIG COMPANY WHEN IT SHOULD BE SAFE TO DO SO.

Of this element in the contract alone, there was no explanation presented by the claimant, compatible with good faith. This fact alone should be enough to determine that the actual beneficial ownership of the stock and the proceeds thereof was intended to remain in the Leipzig company.

The only possible explanation of this part of the transaction, compatible with German good faith upon both sides, however much bad faith toward the United States was involved, would be that the directors of the New York company were acting solely to protect the interests of the Leipzig company, and were acting "as good Germans" to save that large asset for the Leipzig company, even though that act was a colorable one and was designed to defeat the right of capture of enemy property by the government of the United States on the outbreak of the war.

(9) It was not even pretended upon the trial by Max W. Stoehr or his counsel that the transaction was merely taking money from one pile and putting it into another, or that it was a transaction similar to the incorporation of the partnership Stoehr & Sons, whereby for the individual interests of the partners were substituted corresponding interests in the corporation. No such identity of ownership between the New York company and the Leipzig corporation was shown. On the contrary, although all of the Stoehrs owned all of the stock of the New York company, the entire family was not shown to be the holders of even a majority interest in the stock of the Leipzig corporation. Such identity of course would not be presumed. It would have to be affirmatively established. Not only did the claimant not attempt to make any such claim, but the uncontradicted evidence affirmatively disposes of any such identity (testimony of Max W. Stoehr, page 119; folio 233).

(10) No "apparent control" of the stock purported to be transferred was retained by the seller, except the seller was to retain the physical certificates. There was, however, a very similar element in the case, in the undoubted intention of the buyer, upon its certain default, to re-vest in the ostensible seller the record title to the shares, without incurring any loss. That element again, while it did not expressly give to the seller the power of re-taking title upon the seller's own insistance, did legally put it within the power of the buyer to re-transfer the title to the seller without the buyer being responsible in damages.

When the community in interest between the directors of the buyer and the large stock owners of the seller is taken into consideration, their blood relationship and long, close business relations, the inference that the purchaser was intended at the proper time to default and allow the seller to re-take the title, is overwhelming.

(11) The entire record demonstrates the haste with which things were done. At that time and for six weeks thereafter it was perfectly possible and even easy to communicate with Germany by wireless and to ask for and

receive the authority or ratification of the Leipzig corporation to the proposed sale. The fact that the two Stoehrs did no such thing, is one of the most significant things in the case. *If there ever was a case where it was necessary to communicate with the Leipzig corporation, this was such a case.* The only explanation, in view of the ease of such communication *by wireless*, of the failure to communicate with the Leipzig corporation *by wireless*, is that the two Stoehrs in this country were confronted with this dilemma: EITHER THAT THEY WOULD HAVE TO TELL THE LEIPZIG CORPORATION OF THEIR REAL INTENT AND SO MAKE A RECORD CONFESSION OF THEIR MOTIVES, OR ELSE, IF THEY DID NOT DISCLOSE THEIR REAL INTENT, THE LEIPZIG CORPORATION WOULD REPUDIATE THE CONTRACT INSTANTLY.

Either hypothesis is inconsistent with the legal and equitable validity of the contract.

(12) The facts in the case, examined in their true relation and tested by the authorities and decisions make the conclusion inevitable that *there never was any intention to vest legal or beneficial ownership in the shares in the New York company.*

The sole status of the New York company, its sole right to bring this suit, is based upon its alleged legal or beneficial ownership in the shares. If it be not the legal and beneficial owner of the shares, then that legal or beneficial ownership is in the Leipzig company.

As was said by the Court in *The Proton* (*supra*) if the complainant be not the "owner" he "has no *locus standi* to criticise or complain of the condemnation" of the property. The sole recourse of the Leipzig company, if any, is to the Congress of the United States. *The Trading with the Enemy Act* provides that captured enemy property and its proceeds shall be disposed of "as Congress shall direct."

But the right of the Leipzig company, if any, to appeal to the Congress of the United States for the proceeds of the stock would have to be based upon its continued ownership of the stock at the time of the seizure, and that would involve a repudiation of the contract.

(13) In his opinion Judge Hand found that

(a) "The consideration was inadequate. It expressly omitted the good-will which must have had a substantial value and it fixed no present price at all, so that it insured nothing to the Leipzig company except a sale of one-fifth each year at the then book value of its 'hard assets'. If the shares fell in value the Leipzig company bore the loss, both in general value and in book value; if they rose, it did not share the gain except in so far as that was reflected in book values" (page 314; folio 539).

(b) He also said:

"Now Hans E. Stoehr was not acting alone for himself and his family. The record does not show how many outside shareholders there were in the Leipzig company, but they were many. He was in the position of selling for an apparently inadequate consideration to his family, property in which other persons were interested as well as they. The contract, if not, therefore, justified upon the principle of selling to Crassus a burning house, could not be justified at all; it was apparently a fraud. * * * It was not likely that Heyn, a capable adviser, should have seriously expected a contract with such infirmities to stand; indeed, it is not credible that the parties could have intended it as a commercial bargain at all, except it were, what it was not, a desperate catch at salvage" (page 314; folios 539-540).

(c) Judge Hand further held:

"Article five in terms provides that the remedy of the Leipzig company on default shall be one which is in substance strict foreclosure, and that after strict foreclosure there shall be no further right of action on either side. It is quite true that it does not expressly say that this shall be the only remedy, but in view of the conclusion of the article I should be disposed so to construe it, especially when, as I have said, there are elsewhere no express covenants to pay the purchase price. It is unexpected, to say the least, that an experienced lawyer like Heyn should

have introduced a clause of strict foreclosure in a genuine contract of sale, knowing it to create a forfeiture" (page 315; folio 540).

(d) Judge Hand next considered and disposed of the option theory and said:

"Therefore, I think I may say that it is demonstrated that neither was the contract intended to sell out in an emergency so as to escape putative capture, nor was it a genuine business transaction dependent upon an estimate of the mutual advantages of the parties." (page 315; folio 541).

(e) Judge Hand next comes down to the real basis of his decision and holds:

"THERE REMAINS ONLY THE POSSIBILITY THAT IT WAS NOT INTENDED TO REPRESENT THE REAL PURPOSE OF THE PARTIES AT ALL, BUT TO SERVE AS A COVER FOR ANOTHER PURPOSE. We are, moreover, not left to surmise as to what that purpose was, because the written statements of Hans E. Stoehr and Heyn just before the capture, very frankly disclose it. It was merely the continuation of what they had done in 1915, when they put the legal title in the name of Hans E. and Max W. Stoehr for convenience of management, and what they had done in the case of the partnership just before February twentieth, 1917, for the same reason. They wished to put their house in order against the disabilities and inaccessibility of their German associates during the period of a war which could certainly not go more than five years. This they did, so far as I can see, without the slightest anticipation of any confiscation of enemy property" (page 315; folios 541-542).

(f) Judge Hand next carefully analyzed the Heyn and the two Stoehr letters, and pointed out the fact that Heyn "was positively required to state the character of the relations arising under the contract of February twentieth, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig company

had only a vendor's lien, it would have been a wrong upon Stoehr & Sons Inc. to fail to state its full rights. IN SAYING THAT THE 'CONTROL' FOR PURPOSES OF THE ACT WAS IN THE LEIPZIG COMPANY, I MAY FAIRLY SUPPOSE THAT HE HAD IN MIND THOSE PROVISIONS OF SECTION SEVEN (a) UNDER WHICH HE WAS ACTING; HE USED 'CONTROL' AS 'OWNED'" (page 316; folio 543).

(g) Judge Hand summarizes his conclusions as follows:

"Heyn and Hans E. Stoehr are now dead, but the aspect which the plaintiff seeks to put upon the contract is an apocryphal afterthought, which there is no reason whatever to suppose that they, were they alive, would now have the disposition, or the hardihood, to adopt. Their declarations *ante litem motam* fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates, or the United States in its right as captor. I HAVE NO QUESTION THAT THE BENEFICIAL OWNERSHIP OF THE LEIPZIG SHARES WAS ALWAYS INTENDED TO REMAIN IN THE LEIPZIG COMPANY" (pages 316-317; folios 543-544).

Counsel for the appellant at various places in his brief endeavors to answer those arguments of Judge Hand.

At pages 73-74 he states that "the Leipzig company would be unable to participate in the management of the Botany Worsted Mills" and he says: "The general purpose of preventing the dismemberment of the Botany Worsted Mills was a sufficient reason for the purchase by the one and for the sale by the other of the parties".

Again at pages 78-79, he says: "The acquisition by this New York corporation of 14,900 shares of the stock of the Botany Worsted Mills WAS LIKEWISE INTENDED TO CONSERVE THE BUSINESS OF THE LATTER CORPORATION AND TO AVOID THE MISMANAGEMENT OR WASTE THAT MIGHT RESULT WERE THE CONTROL AND MANAGEMENT TO FALL INTO THE HANDS OF A SMALL MINORITY OF STOCKHOLDERS". At

page 57 he says "IT WAS ENTIRELY NATURAL, UNDER THE CIRCUMSTANCES, FOR SUCH A TRANSFER TO BE MADE".

There are two answers to his arguments: First, if the Leipzig company intended to sell the shares, IT WOULD LOSE EVERYTHING. It would lose the shares under the sale and it would lose the money or the right to the money, because it would be captured. In either event the Leipzig company would not be interested in "avoiding mismanagement or waste" in the Botany.

When he says, therefore, "it was entirely natural that such a transfer be made", he purposely does not answer the question—entirely natural for whom? He does not seem to claim that it was "entirely natural" for the Leipzig company to make the transfer. Thus he does not meet the cogent arguments of Judge Hand to the effect that the contract was not intended as written.

Again (at page 57) he refers to the contract "making it possible to preserve and conduct the business without embarrassment". But the answer is that if the contract was intended to be a sale, the Leipzig company would no longer be interested "to preserve and conduct the business without embarrassment", and that if there was a sale it would lose everything for the reasons stated.

When he argues that "the Leipzig company would be unable to participate in the management of the Botany Worsted Mills", and that it therefore recognized "the desirability of its retirement from the American field" (pages 73-74), he makes statements whose meaning is doubtful and vague. If the only purpose of the contract was that the Leipzig company was not to participate in the management of the Botany during the war, that would sustain the contention that the voting control only was to be placed in the New York company, and that the beneficial ownership remained in the Leipzig company.

All of those statements are merely an attempt to confuse the benefits *to the New York company* with *alleged* benefits to the Leipzig company, so as to lead to the con-

clusion that the contract was a prudent business transaction for the Leipzig company.

In the appendix to this brief we have demonstrated that the only course that could have benefited the Leipzig company was A SALE FOR CASH. Nowhere in his brief does counsel for the appellant meet those arguments nor answer *by facts* in the record the reasoning in Judge Hand's opinion which led him to the conclusion that as a commercial transaction the contract was "too open a fraud upon the Leipzig company to even admit of argument" (page 315; folio 541).

(14) In Point II of his brief, counsel for the appellant argues that

"There was nothing in our jurisprudence which contemplated that these shares of stock should, on the outbreak of the war be seized by our Government as enemy property, even in the absence of the contract of February 20, 1917" (page 41).

He then cites the case of *Brown* v. *The United States*, 8 Cranch., 109, and asserts:

"To say, therefore as appellees have contended, that this contract was made for the purpose of defeating the United States of its belligerent rights, is in total disregard of this accepted doctrine" (page 45).

Again, in Point III of his brief, he says (page 46):

"In determining the bona fides of the contract of sale as between the parties thereto and our Government, it is important to take into account the state of the law, as understood at the time when the contract was entered into, with respect to the effect of a possible war on privately owned property within our jurisdiction".

Then follows a voluminous citation of decisions, authorities on international law, treaties and the writings of publicists (pages 46-57) in an attempt to show that on February 20, 1917 it was a rule of international law that enemy private property on land was free from confiscation and capture. From this he argues that the parties can-

not be deemed to have attempted to avert a capture of the shares which they had no reason to think would be made by the United States in the event of war (page 53).

The fallacy of that is almost too obvious to require argument. The authorities which he cited may have been in point before the German war. But on February 20, 1917, the German war had already been waged for nearly three years. During that time all of the belligerents had captured and confiscated private property on land. Those captures and confiscations included debts, rights under contracts, bank balances, shares of stock and countless other kinds of property rights and interests, to an extent and nature before that time unknown in the conduct of war. Those captures and confiscations amounted to hundreds of millions of dollars, as is universally known. Therefore the pretense that the parties to the contract in February 1917 did not have the certainty of capture and confiscation of enemy property in their minds, is reduced to an absurdity.

To what extent war may change the rules of international law is illustrated in the chief case cited by counsel for the appellant, *Clarke* v. *Morey*, 10 Johns, 68, 72. In that case Chancellor Kent said that it might be regarded as the public law of Europe that the subjects of the enemy, so long as they are permitted to remain in the country, are to be protected in their persons and property. But he added the significant exception: "The anomalous and awful case in the present violent power upon the continent excepted". He was writing of the Napoleonic war.

We might say, in regard to all the authorities cited by the appellant, that they were rendered obsolete by the "anomalous and awful case" of Germany in the German war. The continued violations of international law by Germany led to modifications of the rules of international law which modifications must have been present in the minds of the parties on February 20, 1917.

Whatever may have been the "jurisprudence", to use his favorite word, prior to 1914, it is absurd to argue that

on February 20, 1917, the parties did not have in mind the possibility of capture. At that time the Republic of France, Great Britain, Canada, Australia and the then Empire of Germany each had exercised its sovereign right to capture enemy property on land. That fact was well known to those who participated in the attempted execution of the contract. It is absurd to say that the parties to the contract believed the state of the law to be as stated in appellant's Point III, when in fact during the war then in progress the principal warring powers *had* exercised the power of capture and confiscation. It was well known that in the anticipated event of the entry of the United States in the war it would exercise its sovereign right to capture enemy property.

(15) Counsel for the appellant (page 49) relies upon the Treaty of Amity and Commerce between the United States and Prussia of January 11, 1799. He relies upon Article XXIII thereof, which is as follows: "If war should arise between the two contracting parties, the merchants of either country *then residing in the other* shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects without molestation or hindrance."

He also relies upon Article XXIV of the Treaty, dealing with treatment of prisoners of war, providing that war should not be construed as "annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations".

From these provisions he argues (page 53) that: "The vendor had the assurance that, even in the event of war, it would be protected in the enjoyment of its property, and that it would have the right, so far as it was capable of being carried away, to remove its property from our territory."

That argument is obviously unsound. The Treaty by its terms applied only to "merchants" of either country *"then*

residing" in the other. There is no conflict between *The Trading with the Enemy Act* and that Treaty. Under the terms of the *Act,* a German merchant residing in this country at the outbreak of the war did not become an "enemy", as defined in the *Act,* unless and until the President should by proclamation include such merchant within the term "enemy, if he shall find the safety of the United States or the successful prosecution of the war shall so require it".

It is well known that certain Germans in the United States were thus proclaimed "enemies" and were interned. But it is equally well known that only those were interned who were *proved* to be conspirators to commit arson, murder and assassination, to foment riots and resistance to the draft laws, or were caught in bomb plots and other criminal conspiracies to destroy human life and property on land and sea, or were using German money and German property in this country for the purpose of stirring up trouble in Mexico and other countries, and otherwise scheming and working in the interest of Germany and Germany's success in the German war.

Finally, Germany itself disregarded the treaty that the counsel now relies upon to restore the captured asset to a German company. Americans were not allowed, after April 6, 1917, "to remain nine months" in Germany "to collect their debts and settle their affairs" and then to "depart freely, carrying off all their effects without molestation or hindrance". On the contrary, their property was seized, and they were neither allowed to "depart freely" nor to "carry off all their effects without molestation or hindrance".

The Germans as "sacredly observed" the provisions of that treaty as they "sacredly observed" the provisions of countless other treaties and countless "articles of the law of nature and nations" that they ruthlessly violated.

(16) Counsel for the appellant goes so far as to assert that "even after April 6, 1917, and at any time prior to October 6, 1917, it could unquestionably have sold its shares under the protection of that treaty with Prussia proclaimed in 1800, and of the principles of international law

that we have discussed" (pages 55-56). That assertion overlooks the fact that trading and intercourse with the enemy is ILLEGAL AT COMMON LAW AND UNDER OUR LAW. It is emphatically not true that the Leipzig company could have made a sale of the shares in question at any time between April 6, 1917, and October 6, 1917, the date of the passage of the *Act*. The decisions of this Court on that point are many. The cases of *"The Rapid"*, 8 Cranch., 155; and *"The Julia"*, 8 Cranch. 181 make the point not even arguable.

(17) In Point II of appellant's brief, counsel for appellant says:

"But it is argued that the terms of sale were of such a character as to evince the intention that notwithstanding the transfer *the control* of the shares was to be left with the Leipzig company, and that there was in fact no sale" (page 59).

Again, at page 63, he states:

"But it is further argued that these provisions show that the Leipzig company reserved to itself *the control* of the shares of stock of the Botany Worsted Mills by virtue of this agreement".

We have *not* argued that the *"control"* of the shares was to be left with the Leipzig company. On the contrary we contend and the contention is abundantly supported by the admissions contained in the Heyn letter, that the purpose of the contract and the entries made on the books of the Botany purporting to be a transfer of the shares to the New York company, was to place the "control" of the shares in the New York company, which was in turn controlled by voting trustees. The beneficial ownership was to remain in the Leipzig company.

(18) On page 60 of the appellant's brief, he argues that:

"In lieu of interest on deferred payments, it was stipulated that, in addition to the book value of the shares,

there should be taken into consideration and account the amount of dividends received by the New York company during the period elapsing before the final payment of the several instalments".

This assertion is made in support of the contention that the contract was a justifiable commercial transaction and that "it was entirely equitable to both parties" (page 60). The record shows that the dividends declared by the Botany for the year 1917 amounted to 17%, for the year 1918 to 25%, and for the year 1919 to 25%. The parties to the contract had every reason to assume that the dividends on the shares would be approximately at the rate of those given for the years 1917, 1918 and 1919. It is not true therefore that the deferred payments were "in lieu of interest".

The provision about dividends was obviously put into the contract to give it an appearance of a bona fide sale, and thus to throw dust into the eyes of whatever government officer might examine into it. As there was no obligation on the New York company to make any payment, the provision about adding dividends to the payments was meaningless and was never intended to be acted upon.

(19) On page 62 of his brief, counsel for the appellant says that:

"It is further asserted that the failure to pay the first instalment when due operated as a re-transfer to the Leipzig company of the shares of stock, and that the nonpayment of an instalment of the purchase price for a single day after the date of its maturity operated as a forfeiture of the rights of Stoehr & Sons, Inc. to these shares. That conclusion is entirely at variance with the terms of the contract".

He then makes an elaborate argument to show that the forfeitures provided for in the fifth paragraph were dependent upon notice by the Leipzig company to the New York company.

We have not contended that the failure of the New York company to pay the first instalment "operated as a re-transfer to the Leipzig company of the shares of stock".

The Alien Property Custodian seized the shares not on the theory that there had been a re-transfer to the Leipzig company, but because the contract never transferred the shares to the New York company at all. As there had been no transfer on February 20, 1917, there could of course be no re-transfer on February 20, 1918. The argument of counsel for the appellant is based on a construction of the contract. The rights of the Alien Property Custodian to the 14,900 shares were not based upon a construction of the contract, but on the fact that, as Judge Hand stated in his opinion, the "beneficial ownership of the Leipzig shares was always intended to be left in the Leipzig company" (page 317), and that "there never was any transfer at all" (*ib*).

POINT II

The contract was signed utterly without authority of any kind

I

The contract was signed by "Kammgarnspinnerei Stoehr & Co., Actiengesellschaft, by Hans E. Stoehr." It purported to transfer a $6,000,000 asset owned by the Leipzig company, which company had many stockholders, to a New York company, all of the shareholders of which were the four Stoehrs. It fixed extraordinary and unusual terms and a most unusual method of arriving at the price of sale. It made no allowance for good-will or trade-mark or trade-name values—a very large element of value.

It placed in the possession of the New York company, which then had on the stock book of the Botany the 5,690 shares, the immediate stock control of the Botany, and, through that stock control, the control of its directorate, its officers, its policy, its business, and of all its other financial

operations, and placed it in the power absolutely of the New York company to dominate the policy of the Botany, specifically to fix and control its financial status, to fix and determine what its earnings and surplus should be, to fix and determine the amount of bonuses and extra compensation to executives and their distribution, and absolutely to fix *in its own unqualified discretion the book value* of the very shares which were the subject of the contract, which book value determined the purchase price.

If it can be conceived that sane directors of the Leipzig company would, even under any conceivable circumstances, have authorized or approved such a contract, such authority or approval would have to be evidenced by the most express and explicit direction, not merely of the two German managing directors or of all the procuristen of the Leipzig company, but *of the entire membership of its aufsichstrat.* Hans E. Stoehr must have had (a) either *express* or (b) *implied* authority to affix the name of the Leipzig company to the contract.

There is not a particle of evidence in the case of any *express* authority from the Leipzig company to him to sign the contract. The complainant admitted upon cross-examination that he had never seen any written authority from the Leipzig company relating to the contract, either by a managing director or any of the other parties, or any resolution of its board of directors, its aufsichstrat, relating to the same (pages 125-126; folios 242-243).

The complainant however attempted to make out a course of dealings in which Hans E. Stoehr, as the complainant pretended, represented the Leipzig company, as tending to show that Hans E. Stoehr had *implied* authority to represent that company or was held out by that company as having such authority.

He first testified that Hans E. Stoehr voted the stock of the Botany at its stockholders' meetings (pages 110-111; folios 212-213) and that he so voted that stock in 1913 and 1914. He later corrected that statement by saying that when Eduard Stoehr, his father, was in the United States, he as chairman of the Leipzig company, voted the stock

at the stockholders' meetings of the Botany; that it was a rule that when his father was over here his father represented the Leipzig company, and that when his father was not at the stockholders' meetings, his brother Hans E. Stoehr voted the stock of the Leipzig company (pages 110-111, folio 213). Max W. Stoehr had said that when his father was not at the stockholders' meetings "my brother *represented* the firm."

Now, a reference to the undisputed facts as to the votes cast at the stockholders' meetings of the Botany, as shown by its minutes, from March 15, 1910 to May 28, 1910 (defendants' exhibit Y, pages 245-248; folios 449-450) demonstrates the falsity of that testimony. As appears by that exhibit, at the meeting held March 15, 1910, "Kammgarnspinnerei Stoehr & Co. voted in person 14,945" shares, and manifestly by Eduard Stoehr, for the next entry is, "Eduard Stoehr voted *in person* 4,185" shares. Eduard Stoehr was then one of the two directors of the Leipzig company. Hans E. Stoehr was *never* one of the two directors of the Leipzig company but was only a member of its aufsichstrat. There is all the difference in the world between the power of the *two directors* of the Leipzig company and the power *of a member of its aufsichstrat.* The two directors corresponded to the chief executives in an American corporation. The members of the aufsichstrat were not shown to have any more authority than the usual authority possessed by a member of a board of directors or an executive committee of an American company, and in no case has either a member of the ausichstrat or of an American board or executive committee *as such* any power to commit the corporation. That distinction runs all through defendants' exhibit Y and is expressly shown in our cross-examination of Max W. Stoehr, who testified as follows:

> "There is a director, and he has a so-called 'procuristen' to manage the business. This 'procuristen' here would be a director, and I really do not know how many there were in Leipzig. I do not know how many people had 'procuristen' for the

Kammgarn-Spinnerei in 1915, 1916 or 1917, for these people have no voting power; they are only managers of the business. The executive is the managing director. Georg Stoehr and Dr. Kuntze were the two executives of the company in 1916, the only two who could sign the company alone or separately; of the procuristen, two can sign together. When the company was dealing with banks or passing titles to the property, the signatures of either of the managing directors alone would be accepted, but that when we were dealing with the procuristen and when the company had to sign a document binding the company or transferring title, and the procuristen signed it, there had to be two of them, but as the procuristen changes from time to time their signatures had to be identified like bank signatures and they had to be stated officially as authorized to sign for the company" (page 125; folio 241).

It appeared from the uncontradicted testimony of Ferdinand Kuhn that when the father Eduard Stoehr was here "he represented the firm and voted in person as a director, an active director of Kammgarn-Spinnerei Stoehr & Company. Hans E. Stoehr was not a director, he was a member; he was not an active director of Kammgarn-Spinnerei; he was not a director at all. I mean in what we call in the Kammgarn-Spinnerei is a director. There are two official directors. * * * He was a member of the aufsichtsrat; that was all, as far as I know here" (testimony, page 164; folios 315-316).

At the annual meeting held March 21, 1911, "Antonio Knauth voted *as proxy* for Kammgarnspinnerei Stoehr & Co. 4,900" shares. At that meeting "Hans. E. Stoehr voted *as proxy* for Commerzienrat E. Stoehr 4,335" shares, and "Hans E. Stoehr voted in person 720" shares (defendants' exhibit Y).

At the annual meeting of March 19, 1912, "Kammgarnspinnerei Stoehr & Co., a. g., represented by George Stoehr *in person*," voted 14,910 shares. "Hans E. Stoehr *as proxy*

for Eduard Stoehr voted 4,185" shares. "Hans E. Stoehr voted in person 785" shares. "Eduard Stoehr voted in person 555" shares. (*ib.*)

At the annual meeting of March 18, 1913, "Hans E. Stoehr voted *as proxy* for Kammgarnspinnerei Stoehr & Co., a. g., 14,910" shares. "Hans E. Stoehr voted *as proxy* for Eduard Stoehr 4,185" shares. "Hans E. Stoehr voted *as proxy* for Georg Stoehr 555" shares. "Hans E. Stoehr voted in person 785" shares. "Max W. Stoehr voted in person 100" shares. (*ib.*)

At the annual meeting of March 17, 1914, "Hans E. Stoehr voted *as proxy* for Kammgarnspinnerei Stoehr & Co., a. g., 14,900" shares. (*ib.*)

The defendants produced in evidence, as defendants' exhibit T-1, *the written proxy* of Kammgarnspinnerei Stoehr & Co. actiengesellschaft, by a Dr. Kuntz and one Hartz, who was one of the procuristen, duly witnessed, dated March 2, 1914 and empowering Hans E. Stoehr to vote at the annual meeting of the stockholders in March of that year. Defendants' exhibit Y shows the facts in reference to all of the above meetings, that the stock was voted *by proxies*, "Proxies at Mill."

The by-laws of the Botany, defendants' exhibit J, Article XVII (pages 225-228; folios 427-429), relating to "stockholders and elections," paragraph 3, expressly provided:

> "At all meetings absent stockholders may vote by a proxy authorized by a *writing executed by the owner of the shares.* The president or other chairman of the meeting, and in case of an election, the judge of election, shall *judge the sufficiency of the powers of attorney produced,* but no proxy shall be voted on, allowed or received for more than three years from its date.
>
> "Proxies shall only be given to shareholders of the company."

The foregoing facts, and the execution of that written proxy by the Leipzig company to Hans E. Stoehr, com-

pletely demonstrate the falsity of the assertion of Max W. Stoehr in his testimony that Hans E. Stoehr "was the *accredited representative* here of the Kammgarnspinnerei. *He voted their stock at their stockholders' meetings.*" Though he *voted their stock* at the stockholders' meetings (testimony of Max W. Stoehr, pages 110-111; folios 212-213), that vote was pursuant to *a written power of attorney* in every case and hence that was *no proof whatever* that Hans E. Stoehr had any *general authority* to represent the Leipzig company.

At the annual meeting of March 16, 1915, "Kammgarnspinnerei Stoehr & Co. actiengesellschaft represented by Georg Stoehr voted *in person* 4,910" shares. "Stoehr & Sons voted in person 5,600" shares. "Hans E. Stoehr as trustee voted in person 10,000" shares.

Those facts completely dispose of the attempt to prove "implied authority" so far as voting was concerned. The implication which Max W. Stoehr sought to have drawn from his testimony was that his brother Hans E. Stoehr stood upon the same footing, so far as the power to represent the Leipzig company was concerned, as did his father Eduard Stoehr, who was first one of the two directors and later a member and chairman of the aufsichstrat, or his brother Georg who succeeded his father as one of the two directors of the Leipzig company. The record of the Botany as shown by exhibit Y demonstrates the utter falsity of Max W. Stoehr's testimony on that point (defendants' exhibit Y).

In an attempt to show other transactions in which he claimed Hans E. Stoehr "represented" the Leipzig company, and in order to draw the inference that he was held out to be its agent, Max W. Stoehr testified that in 1914 the Leipzig company "sold worsted yarns over here which were supervised by Hans E. Stoehr" (page 111; folio 213); that the Botany had charge of those sales and that Hans E. Stoehr "negotiated them to the Botany" (page 111; folio 213); that Hans Stoehr "transmitted the sales"; that he "effectuated the sales"; that "the Kammgarnspinnerei Stoehr & Company offered yarns, or Botany Worsted Mills wrote over and asked for delivery of yarns," and that "was

a sale to the Botany Worsted Mills, and *all these affairs were directed by Hans E. Stoehr"* (page 111; folio 213).

But on cross-examination he was compelled to admit: "All these affairs were directed by Hans E. Stoehr. Mr. Stoehr signed the letters and he did all that was necessary in the form of negotiations. Hans acted for Botany and wrote the Kammgarn-Spinnerei; he signed the letter on behalf of the Botany Worsted Mills and the Kammgarn-Spinnerei wrote back to Hans. * * * They sold some yarns to the Botany Mills or some other customers, my brother Hans writing for the Botany Worsted Mills to the Kammgarn-Spinnerei, and they answered him. My brother Hans was representing at that time, as I said before, the Botany Mills, and the German house was being represented by either my brother Georg or my father over there" (testimony, page 111; folios 213-214).

It is apparent, therefore, that although the complainant first testified that Hans was "acting for both the Botany and the Leipzig company" in all the transactions, he finally admitted that in regard to transactions between the Leipzig company and the Botany *Hans E. Stoehr acted for the Botany.*

With respect to the sale of wool to other concerns than the Botany, where the Botany for the most part acted as selling agent of the Leipzig company (page 111; folios 214-215), he claimed that Hans E. Stoehr was the particular officer of the Botany who conducted those negotiations (page 111; folios 214-215).

With respect to those yarn transactions, therefore, the testimony of the complainant came down to this: That in the case of sales by the Leipzig company to the Botany Hans E. Stoehr did *not* represent the Leipzig company but the Botany mills, and that in the case of sales of yarns of the Leipzig company to concerns other than the Botany, the agent of the Leipzig company in this country was not Hans E. Stoehr but the Botany company. There is accordingly nothing in the testimony of the complainant with reference to those transactions to show any *general agency or any agency* of the Leipzig company to Hans E. Stoehr at all.

As to the inference which Max W. Stoehr sought to have drawn from his testimony regarding the voting of stock of the Leipzig company by his brother Hans E. Stoehr, Zimmerman testified (page 140; folio 271) that there was uniformly *written* authority from the Leipzig company to vote the 14,900 shares at the various meetings of the stockholders; that there was always *written* evidence of the right to vote; always a *written* proxy from the Kammgarnspinnerei to vote that stock (page 140; folio 271). We have shown that at the meeting of 1914 the *written proxy* to Hans E. Stoehr for the Leipzig company was signed by a Dr. Kuntz, who was one of the two directors, and by one Hartz, who was one of the procuristen (defendants' exhibit T-1, page 302; folio 518). The facts in connection with the voting by Hans E. Stoehr of the stock of the Leipzig company, therefore, far from showing that Hans E. Stoehr had *implied authority* or *any* authority to represent the Leipzig company in any other matter, go rather to show that in cases where Hans E. Stoehr *did* represent the Leipzig company he had *formal written, express authority in each case.*

Zimmerman testified that he had searched the records of the Botany for any *written power of attorney* purporting to be given by the Leipzig company to Hans Stoehr for the years 1915, 1916, 1917 and 1918 and that he had found no such authority or *any copy of a resolution from the board of directors of the Leipzig company,* or anything under the seal of the company, purporting to confer authority on Hans E. Stoehr (pages 143-144; folio 279).

With reference to the attempt of Max W. Stoehr to give the impression that Hans E. Stoehr represented the Leipzig company in yarn transactions, Zimmerman testified that he had examined the office files of the Botany company for correspondence between the Leipzig company and the Botany from the year 1913 to the end of 1916, the last communication (pages 162-163; folio 313). Approximately 100 to 150 letters were received by the Botany in that time, all addressed to the Botany, and signed by Kammgarnspinnerei Stoehr & Co. and then either signed

by two procuristen or by one procuristen and one managing director, or signed by the two managing directors (pages 162-163; folio 313). They were *all* addressed to the Botany Worsted Mills. The same was true of the ten or a dozen letters which passed between the Leipzig company and the Botany during that time relating to dividends on the stock in the Botany owned by the Leipzig company (pages 162-163; folio 313).

Zimmerman further testified that he had searched the files of the Botany for any letters authorizing Hans E. Stoehr to deal with any stock of the Leipzig company and that he had found no such letter (pages 146-147; folios 283-284). He also testified that he had searched the files of the Botany for any letters authorizing Hans E. Stoehr to deal with the balances of the Leipzig company and that he had found no such letter (pages 146-147; folios 283-284), and that the searches so made covered the years 1914, 1915 and 1916; and that there was no mail after 1916 (pages 146-147; folios 283-284).

Finally, the testimony of Max W. Stoehr that Hans E. Stoehr "represented" the Leipzig company in the yarn transactions in 1914 was directly and explicitly contradicted by the testimony of Ferdinand Kuhn, the president of the Botany company. Mr. Kuhn, as shown in defendants' exhibit V (pages 242-244; folios 445-446), was the treasurer of the company in 1914. As shown by the by-laws, defendants' exhibit J, the treasurer of the company had "general charge of the business" (Article VII, par. 1; page 225; folio 427). At the March meeting of the stockholders in 1915, Hans E. Stoehr was elected treasurer and Mr. Kuhn became second vice president. On the death of Hans E. Stoehr, Kuhn became active "in directing the affairs of the company." He was elected by the new board as acting president on August 20, 1918 on the resignation of Prehn, and was elected president of the company at the directors' meeting of the present board March 17, 1919 (page 163; folio 314).

He testified that the transactions referred to in the testimony of Max W. Stoehr were made directly between the

two corporations, "were signed by the proper officers on both sides, either from Leipzig or in Botany" (page 165; folio 316). His attention being called explicitly to the testimony of Max W. Stoehr that in those transactions *"Hans E. Stoehr acted for both,"* Mr. Kuhn answered:

> "I think those transactions were directly from the Kammgarnspinnerei with the Botany Worsted Mills. * * * The transactions were between the Kammgarnspinnerei Stoehr & Company and Bottany Worsted Mills. Those transactions in the years 1913 and 1914 up to March 1915, were directly, were signed by the proper officers on both sides either from Leipzig or in Botany. I was the treasurer of the company in 1913 and 1914 and the chief executive of the company in that capacity and had charge of the transactions above referred to; I remember the sale of yarns. There was a great deal done in 1914 from January until the outbreak of the war in Europe; I think it was mostly yarns; there may have been a few goods. I had entire charge for the Botany Mills of those transactions; I was the treasurer responsible for it. It might be that certain letters were signed by somebody else at the mill of the Botany going to Kammgarnspinnerei, but they were signed by some officer of the Botany; as in the capacity of an officer of the Botany. I am not sure about every letter, every transaction, it might have been done by some other officials.
>
> By Mr. Quinn:
>
> Q In the course of his direct examination, page 46 of the stenographer's minutes, Mr. Max W. Stoehr testified relating to the transactions with Kammgarn-Stoehr & Company as follows:
>
> 'Your brother Hans wrote for the Botany Mills for the Kammgarn Spinnerei, and they answered *him? A Yes.'*

And on page 47 he was asked and answered thus:

> 'Q You think the Botany Mills for the most part acted, if I may say so, as selling agent? A Yes.
>
> 'Q What particular officer of Botany Worsted Mills conducted those negotiations? A Hans Stoehr.'
>
> Please state the facts of your own knowledge in regard to those transactions.
>
> Mr. Vorhaus: I object to that.
>
> Objection overruled" (testimony, pages 164-165; folios 316-317).

We then asked the following:

> "Q Did the communications from Kammgarnspinnerei to Botany regarding those yarn transactions come from Kammgarnspinnerei direct to the Botany? A. Yes. * * * They came from Kammgarn-Spinnerei and the answers that went from the Botany went direct from the Botany to the Kammgarn-Spinnerei * * *.
>
> Q In the course of his direct examination referring to these yarn transactions, Mr. Max W. Stoehr stated that in said transaction his brother Hans E. Stoehr *'acted for both'*; is that the fact?
>
> Mr. Vorhaus: I move to strike that out.
>
> Motion denied.

The witness (resuming):

> "He acted for the Botany, as an official for the Botany" (testimony, pages 165-166; folios 317-318).

On cross-examination of Kuhn by counsel for the plaintiff as to the yarn transactions the following was the testimony:

> "Q They were handled personally by Mr. Stoehr? I am not asking in what capacity, but Mr. Hans E. Stoehr handled those transactions? A No; I think

I handled those transactions. I did not go out as treasurer and sell the goods; our yarn representative sold them. The Botany bought those yarns from Stoehr & Company" (page 167; folio 320).

As to Hans E. Stoehr's *representing* the Leipzig company in this country, Mr. Kuhn's uncontradicted testimony was that when Eduard Stoehr was here he represented the firm "and voted in person as a director, an active director of Kammgarn-Spinnerei Stoehr & Company. Hans E. Stoehr was not a director, he was a member; he was not an active director of Kammgarn-Spinnerei; he was not a director at all; I mean in what we call in the Kammgarn-Spinnerei is a director. There are two official directors.

"By Mr. Quinn:

Q He never was either?

Mr. Vorhaus: I object to that.

The Court: There is no contradiction. It is exactly what your client has said.

The Witness (resuming): He was a member of the aufsichstrat; that was all, as far as I know here" (testimony, page 164; folios 315-316).

The plaintiff's testimony as to the *implied authority* of Hans E. Stoehr was thus completely disproved by the facts.

The attempt of the plaintiff and his counsel to establish implied authority *completely and utterly collapsed.*

II

In Point XVI of his brief (pages 126 to 143 inclusive) counsel for the appellant argues that the authority of Hans E. Stoehr to execute the contract *"is shown by the record"*.

To establish that contention he quotes from the letter of Heyn & Covington the statement that "H. E. Stoehr *represented* his father and also Stoehr & Co., the Leipzig company, in this country". But he failed to quote the following which immediately preceded that statement:

"Eduard Stoehr, the father, and Georg Stoehr, the brother, *were in charge of the Stoehr interests in Germany*, and *H. E. Stoehr and M. W. Stoehr of the interests in the United States*". But that general statement of Heyn is completely disposed of by the following statement in Heyn's letter: "As we have also stated verbally, there have been no *resolutions or other corporate action* by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction." If H. E. Stoehr had authority to "represent" the Leipzig company, no "resolutions or other corporate action" of the Leipzig corporation "in confirmation of this transaction" would have been necessary.

In further support of his contention that the authority of Hans E. Stoehr was "shown by the record", counsel for the appellant refers to the following facts:

(1) Hans E. Stoehr was a member of the board of the Leipzig company.

(2) He had the confidence of his associates on the board (there was no proof of this in the record and the appellant cites none).

(3) He held a substantial interest in the corporation.

(4) He had been in Germany in the spring of 1914;

(5) Hans E. Stoehr held the legal title to 10,000 of the shares (pages 136-137, appellant's brief).

Notwithstanding the appellant's statement, the record is absolutely destitute of any proof that Hans E. Stoehr had authority to sign the contract. The authority or rather lack of authority that he had by reason of his being a member of the board has already been discussed. The fact that he had the confidence of his associates on the board (although there was no proof of this); that he had a substantial interest in the corporation (by which is apparently meant that he was a stockholder in the corporation); that he had been in Germany in the spring of 1914; and finally, that he held the legal title to 10,000 of the shares, cannot by any stretch of law be made to establish an authority on the part of Hans E. Stoehr to execute in the name of the Leipzig company and

on its behalf a contract disposing of an asset of the value of approximately $6,000,000.

These flimsy statements establish beyond doubt that Judge Hand was correct in stating in his opinion that the authority of Hans E. Stoehr to execute the contract was at the trial "in no wise proved".

Finally, counsel for the appellant falls back upon a number of cases holding that the authority of an agent of a corporation need not be in writing (page 138) and that there is a presumption as to the power of officers of corporations. But the cases that he cites (pages 138-143) have utterly no relation to the facts in the case at bar. They were cases of persons dealing with corporations, accepting the contracts and obligations of corporations, signed by officers of corporations WHO WERE HELD OUT TO THE WORLD BY THE CORPORATIONS AS ITS OFFICERS AND CLOTHED WITH OSTENSIBLE AUTHORITY TO ACT.

Accurately stated, no "presumption" is necessary in such a case. The corporation by its own act in electing persons to official positions and representing them to the world to be its officers, is estopped from either questioning their authority or pleading any secret limitations upon the authority. The doctrine is for the protection of persons who deal with the corporations "in good faith and without actual notice of any inherent defect" in their authority.

The case at bar does not present the case of a person relying upon the ostensible authority of an *officer*. Even on the theory of presumption, those cases do not apply to the case at bar for the reason that the presumption is based on the fact that the person purporting to act for the corporation *is an officer thereof or has been held out by the corporation* as an officer, clothed with an officer's power. There was a complete absence of proof that Hans E. Stoehr had ever been an *officer* of the Leipzig company. On the contrary, the defendants affirmatively proved that he *never had been an officer* and was never anything more than a member of its board of directors. There was no proof even that he had been elected a member of its board of directors in 1916 or

1917. There could not be any presumption that he had acted within the powers of an officer when *there was no proof that he had ever had any powers as an officer of the Leipzig company at all.*

III

Counsel for the appellant in his point XVI (pages 138 to 145 inclusive) argues that the authority of Hans E. Stoehr to act for the Leipzig company was "shown by the record". He preceded his argument in that point by his point XV in which he claimed that "the existence of the authority cannot, under the circumstances, be questioned" (page 137).

Judge Hand in his opinion (page 312) said:

> "I shall assume for argument's sake that a shareholder may bring a representative suit in the right of his corporation under section nine, and that the plaintiff here has shown a situation justifying his recognition in that capacity. I shall further assume, *though the fact is in no way proved,* that Hans E. Stoehr had a general authority which would cover the execution of contracts for the sale of such property as this for a consideration such as this. This assumption is all that the plaintiff has suggested he could prove if he had the chance to take proof in Germany".

Again at the close of his opinion Judge Hand (page 318) said:

> "It becomes unnecessary to consider the prayer of the plaintiff for letters rogatory".

In view of the completeness of the proof offered by the defendants that, assuming that Hans E. Stoehr had authority to act for the Leipzig company, that company never intended to make the sale of the shares referred to in the contract, and because of the fact that on the outbreak of the war the contract became null and void, the argument

contained in appellant's point XV has no bearing upon the merits of the case or of this appeal. Furthermore, the claim made in point XV of appellant's brief that "the existence of the authority cannot, under the circumstances, be questioned", is not raised in any of the assignments of error, and is therefore not before the Court.

POINT III

The legal title to 14,900 shares never passed from the Leipzig company to the New York company

Counsel for the appellant (in Point I of his brief, page 17) practically admits that the legal title to the shares never passed to the New York company.

The provisions of the by-laws in regard to the transfer of stock of the Botany Company were so unusual and extraordinary that, without arguing the point here, we have summarized those provisions in the appendix for convenience of reference by the Court, if necessary.

POINT IV

Even on the face of the contract the ownership in the stock did not pass

Even on the face of the contract not only was it true that the legal title did not pass, but the beneficial interest or equitable title did not pass.

We have shown that Hans E. Stoehr never had a shred of authority to act for the Leipzig company in the transaction.

But in this point we will assume for the purposes of argument, that H. E. Stoehr *had* authority to execute the contract and that it was duly executed by the parties thereto.

Certificates of stock are not in and of themselves the equivalent of the shares of stock themselves. Shares of

stock are property *sui juris*. They are *choses in action* in a limited sense. Certificates themselves are mere evidence of ownership of stock. They are not identical with ownership. No *general rule* can be laid down regarding the transfer of title to stock. The particular facts of each case must be considered. By-laws may provide that title may be transferred either with or without the delivery of the certificates. By-laws may limit the transferability. They may attach conditions to transfers. They may require that the shares be offered to other stockholders. They may forbid transfers within certain periods when the books are closed. Certificates may on the face of them contain special provisions affecting transfers. The certificates themselves or the by-laws may contain almost any conditions or limitations upon the right of transfer that apply to all of the stockholders of a class equally and that are not inconsistent with the law. The by-laws may limit the time within which proxies may be used and they might even, in the absence of a provision of law to the contrary, provide that only stockholders present in person may vote.

No better example could be given of the lengths to which a corporation can go in special and unusual provisions relating to the transfer of stock than is afforded by the by-laws of the Botany company. But in all these *cases the test is whether the law and the by-laws have been followed*. Where the by-laws contain such peculiar and unusual provisions as those of the Botany, *strict compliance with those provisions is necessary.*

But even tested by the question of the intention of the parties, on the face of the contract, it conveyed no title or ownership in the stock.

Two facts, under the cases, show that on the face of the contract title did not pass, because (a) there was *no obligation* of the New York company to pay for the stock, and (b) the risk of loss always remained with the seller.

(A) There was no obligation of any kind upon the New York company. In paragraph first of the contract the Leipzig company "hereby sells, assigns and transfers" to the New York company, but that paragraph did not

state that the New York company "hereby agrees to buy and to pay for the stock." But that is technical and we base our arguments on facts and not on technical principles.

While paragraph second defined "the terms of the sale and the purchase price for the shares," in that paragraph there was no *obligation* by the New York company to pay the purchase price.

Paragraph third was misleading, for it provided that the certificates "*shall be placed* in the possession of the Leipzig company as collateral security for the amount of the purchase price," whereas in fact there was not a scrap of evidence that the certificates were ever out of the possession of the Leipzig company. That part of the provision was obviously written in to give a misleading impression and to deceive government officers who might investigate the transaction.

Paragraph third also referred to the New York company having "the right to require the *redelivery of*" the shares. That was misleading, for it implied that there had been "a delivery" of the shares by the Leipzig company to the New York company, which was false in fact. There could be no "*redelivery of*" the shares to the Leipzig company when there had never been any "delivery" of the shares by the Leipzig company to the New York company.

So, also, following the reference to the "redelivery" of the shares, the words in paragraph third that "thereupon the Leipzig company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable" were misleading, and designed to deceive any government officers who might examine the transaction.

While paragraph fourth of the contract purported to give the New York company the right "to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig company, with a bank or trust company *to be selected by the Leipzig company,* such deposit to be made with such bank or trust company in escrow," that too was a misleading reference,

for it was well known to the New York parties that the New York company could not, on the breaking out of war, so "require the deposit of" the shares, and, tested by the imminence of war, that provision of the contract was meaningless and sham.

But the fact that THE NEW YORK COMPANY WAS UNDER NO OBLIGATION TO PAY THE PURCHASE PRICE, IS DEMONSTRATED COMPLETELY BY THE PROVISIONS OF PARAGRAPH FIFTH. That paragraph shows that the five periods of payment named in the contract were shams, for it expressly referred to and contemplated the event of *"any* of said annual instalments with said additions provided for in paragraph second, subdivision D thereof" not being paid when due, *and thus for practically indefinite default.* Then it provides that the Leipzig company must notify the New York company *"in writing,"* a thing that the parties knew at that time would be forbidden during war, that it required the payment of the instalment then due with the additions, and "in the event that the New York company shall not within sixty (60) days after said demand pay the said instalment with the additions, then the said shares of stock or any remaining balance of said stock shall be forthwith *retransferred* to the said Leipzig company on the books of the Botany Worsted Mills."

The New York parties knew perfectly well that such a notification would be illegal on the happening of war and it was obviously their definite intention that (a) no annual instalments" should *ever* be paid during the war, (b) that no sixty-day notice should ever be given by the Leipzig company until possibly after the war, when the notice would be given, the sixty days would elapse without payment, and the parties would be *in statu quo.*

That is made perfectly conclusive by the further provision of paragraph fifth that upon the "exercise by the Leipzig company of its sixty-day option" and the "retransfer" to the Leipzig company "all rights on the part of the New York company to said stock and any of said balance shall cease" and the Leipzig company shall retain the five thousand ($5,000) dollars, paid on account as hereinbefore recited, "IN FULL SETTLEMENT OF ANY CLAIM AGAINST THE

NEW YORK COMPANY AND THEREUPON NEITHER OF SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT." Again, they used the misleading word "retransfer". These provisions demonstrate that there was no obligation on the New York company to pay a dollar for a single share.

Taken as a whole therefore it is obvious that the contract was craftily drawn to give the surface appearance of a sale, but its loopholes and conditions and exemptions show that it was a one-sided contract, that it was not a bilateral contract at all, and that the New York company, when the test should come, was under no obligation whatever to pay anything or to perform in any way. No transfer of ownership can be founded upon such an agreement.

(B) THE RISK OF LOSS REMAINED WITH THE SELLER. The contract price was "book value" plus dividends. While a sale of stock according to book value is not unknown, there is usually an allowance for good-will. We never heard of a sale of a large block of stock at a book value *that made no allowance for good-will*—though good-will in this case is a large element of value—accompanied by (a) the immediate transfer of the shares into the name of the purchaser, (b) the immediate right in the purchaser to receive large dividends thereon, (c) the absolute power in the purchaser completely to dominate and control the company, (d) five years' credit, and (e) no responsibility whatever either to make the payments or to account for the dividends received in the meantime.

The seller, had the contract been an honest one, stood to lose in the following respects: (a) loss of book value by reason of the ordinary or extraordinary incidents of business, (b) no allowance for good-will, (c) loss of dividends received by the New York company, (d) loss due to a possible if not probable manipulation of the earnings and book value of the company by the purchaser, in its absolute and unrestricted discretion and control.

Under the by-laws of the company the executives were then entitled to 32 per cent of the net earnings of the com-

pany in any one year and this transaction vested the absolute stock control in the New York company and hence in the two Stoehrs. When it is recalled that there was nothing in the by-laws providing *how* that 32 per cent should be apportioned among the executives, it will be at once apparent what opportunities for plunder were put in the hands of the officials of the New York company, *all at the risk and to the loss of the Leipzig company.*

The peculiar thing in this contract was that it was, in effect, the sale of a majority interest at book value on a long credit and on extraordinary terms. A minority of stock might be sold at book value on credit, but it is difficult to believe that sane men would agree to the sale of a majority stock interest at book value and upon a five years or more credit, had the war lasted five years, and at the same time have put in the power of the purchaser absolutely to loot the company and to destroy or diminish at will the book value of its stock.

We will not attempt to discuss in detail the law as to the distinction between executory and executed contracts of sale, for we have demonstrated that no title to the stock passed to the New York company *even on the books of the Botany* and that, even had there been a real intention by the Leipzig company, the entire contract remained executory. But we will refer to a few cases that bear upon the subjects of this point, namely CONTINUED RISK IN THE SELLER AND NO OBLIGATION IN THE PURCHASER.

Admitting for argument that the question as to the transfer of the property depends upon the intention of the parties, that question is stated by Professor Williston in his work on *Sales* (§262) to be "essentially one of fact." After pointing out that in a contract reduced to writing "this question is determined by the Court, as also if the facts are so clear as to justify but one conclusion, yet the question is always one of fact, subject only to the presumptions given in the following section," Professor Williston adds: "Not too great stress must be laid upon the use of the words 'sell' or 'buy' by the parties. Those words are constantly used as meaning to include *contract to sell or contract to buy*" (*Williston on Sales,* 1909, §262).

Although *on the face of the contract* the Leipzig company retained the certificates, it cannot be said that it "retained security," for it put it fully in the power of the New York company to make the paper certificates in the hands of the Leipzig company worthless, to loot the Botany company, and to make the measure by book value a farce. There was no such thing in this case as the seller being able *to require the purchaser to perform.*

Nor was there, in the language of this Court in *Beardsley vs. Beardsley,* 138 U. S., 262, 265-267, anything like "an agreement to sell, where the moving party, the purchaser, *must within a reasonable time tender performance or make excuse therefor.*" This Court in the *Beardsley* case, after stating that meaning is "not to be determined by any separate clause, but by the instrument as a whole," cited the decision in *Hereyford vs. Davis,* 102 U. S., 235, 243-244, where it is said that the contract was to be interpreted according to "the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." And in the *Beardsley* case this Court quoted from its decision in the *Elgee Cotton Cases,* 22 Wallace, 180, 188, the third test as follows:

> "Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, *even though the goods may have been actually delivered into the possession of the buyer.*"

Tested by that rule, the contract in this case never passed any ownership. The New York company was not "bound" *to pay* anything. It had *to pay* if it wanted to get the beneficial title in any of the shares, and the beneficial title in the stock therefor *"did not pass until that condition was fulfilled."*

The beneficial ownership in the stock as well as the legal ownership remained in the vendor.

The vendee would never have got the beneficial title to the stock until it paid for the stock.

There was a feeble attempt on the face of the contract to give the appearance of the vendor retaining a lien on the certificates. The assertion that only the beneficial interest passed contradicts the other parts of the contract which purport to pass the legal title.

While the actual decision in *Beardsley vs. Beardsley* (*supra*) was that there was a sale, the contract before this Court in that case was radically different from that in the case at bar. That was a contract at arms length, an unconditional declaration of a sale which carried on its face unqualified admission of intent to sell and had none of the elements that were so glaringly present in the case at bar.

Numerous cases could be cited where contracts made on the eve of war are closely scrutinized by the Courts to determine whether property in the goods claimed to be affected thereby has actually passed. We will refer to the following out of many.

In the case of *The Carlos F. Roses*, 177 U. S. 655, a Spanish bark was condemned as enemy's property. But a question was raised as to the enemy or neutral character *of the cargo*. That depended chiefly on the effect of the endorsement of the bills of lading *to neutrals*. The cargo was claimed by Kleinwort Sons & Company, British merchants. It consisted of jerked beef and garlic and was shipped at Montevideo in March 1898 by Gibernau and company, merchants of that place but citizens of the Argentine Republic. The invoices stated that the goods were shipped "to order for account and risk and by order of the parties noted below".

In the case of the jerked beef the consignees noted below were: "the expedition or voyage of the Carlos F. Roses", and "Mr. Pedro Pages of Havana", all concerned being Spanish subjects. The consignees of the garlic were "Mr. Pedro Pages" and the "undersigned, Gibernau and company." There were three sets of bills of lading issued by the master to Gibernau

and company, one for that part of the shipment of jerked beef made for the account of the vessel, another for that part made for the account of Pages, and a third for the shipment of garlic for the joint account of Pages and Gibernau and company. The bills set forth that the goods were taken "for account and at the risk of whom it may concern." The ship's manifest was signed March 15, and the destination of the cargo was stated thus "Shipped by Pla Gibernau & Co. To order". The *visa* of the Spanish consul read: "Good for Havana, with a cargo of jerked beef and garlic". There was no charter party.

On the face of the papers, the Court held that the goods when delivered to the vessel became the property of the consignee named in the invoice, but that as Gibernau and company had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be "ultimately destined for Don Pedro Pages of Havana", must be condemned as enemy property, unless cause to the contrary were shown. Such cause Kleinwort Sons and company endeavored to establish on the ground that after the shipment of the cargo they made advances upon it to the amount of about $30,000, in consideration of which the bills of lading, endorsed in blank by Gibernau and company, were delivered to them with the intent that they should take title to the bills and the cargo, and on the arrival of the latter at its destination, hold it as security with the right to dispose of it and reimburse themselves with the proceeds.

They contended that in that way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills of exchange which were drawn on Kleinwort and company, for the amount of the advances, was any reference made to the cargo, and that while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, *was not delivered until long afterwards.*

On these and other facts this Court held that the cargo never *bona fide* passed and it remained the property of Spanish subjects and was liable to condemnation.

In *The Benito Estenger*, 176 U. S. 568, the facts were:

The Benito Estenger was captured by the United States steamship Hornet on June 27, 1898, off Cape Cruz, on the south side of the island of Cuba. On December 7, 1898, she was condemned by the United States District Court as enemy property. The claimant appealed on the ground, among others, that she was a *British merchant ship*, duly documented and entitled to protection of the British flag, and lawfully owned and registered by a British subject domiciled in Great Britain. It appeared that prior to June 9, 1898, the vessel was the property of Enrique de Messa, a Spanish subject resident in Cuba, and that on that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and the vessel registered as a British vessel, at Kingston, in accordance with the requirements of British law. She had been engaged in trade with the island of Cuba, and more particularly between the ports of Kingston and Montego, Jamaica, and the port of Manzanillo, Cuba. She left Kingston on June 23, and proceeded with a cargo of flour, rice, corn meal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo on June 27 for Montego, and thence for Kingston, and was captured on the same day off Cape Cruz.

According to de Messa's story, he was compelled to sell the steamer in order to get money to live on, and he made the sale for $40,000, for the whole or a large part of which credit was given on an indebtedness to the firm of which Beattie was a member, and that he was employed by Beattie to go on the vessel as his representative and business manager. Beattie in his testimony said that the sale was *bona fide, but declined to state of what the payment of the purchase money consisted.* The Consul of the United States at Kingston testified that Beattie in conversation, while insisting that the transfer was absolute, *admitted that it was effected for the purpose of protecting the vessel.* Ap-

parently no money passed. The Spanish master and crew remained in charge. De Messa went on the voyage as super-cargo. In the brief of the claimant's counsel it was declared that the transfer was obviously made to protect the steamer as neutral property from Spanish seizure, while it was admitted that de Messa *"still retained a beneficial interest after this sale and transfer of flags"*.

On those facts this Court observed that "transfers of vessels *flagrante bello* were originally held invalid", but that the rule had been "modified", and is thus given by Mr. Hall, who after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war", says: "In England and the United States, on the contrary, the right to purchase vessels is *in principle* admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and *the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war*". *Hall International Law* (4th ed.) 525.

The decree of the District Court condemning the vessel was accordingly affirmed by this Court.

In *The Venus*, 8 Cranch 253 (1814), a vessel sailed from Liverpool for New York prior to the declaration of the war of 1812. She was captured on August 6, 1812 by an American privateer. A part of the cargo which was condemned as lawful prize was certain goods shipped from England *via* certain American citizens resident in England (who were held to have acquired an enemy character) to citizens of the United States in New York. In a letter from the shipper in Liverpool to the consignee in New York covering an invoice of those goods the shipper said: "They are to be sold on joint account or on mine at your option."

It was held that the property in the goods did not pass from the English resident to the American citizen until the option was exercised, *and until that election was made the goods were at the risk of the shipper,* which was conclusive as to the right of property.

This Court said at page 274:

> "The whole question as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is *in whom the right of property was at the time of capture?* To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale, agreed to by both parties; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee, who states, that in 1810, he was in England, and agreed with Jones, that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that in consequence of this agreement, the present shipment was made. Now, admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the use of the shipper solely; and consequently it amounted to nothing so as to divest the property out of the shipper, *until Magee should elect to take them on joint account,* or to act as the agent of Jones. *Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property."*

In *The Frances*, 8 Cranch 353 (1814), certain goods were shipped by a British subject resident in Glasgow and consigned to a firm in New York. The bill of lading was in the name of the New York firm and the invoice purported to be on their account and risk. A letter from the shipper to the consignees stated that

> "I have exceeded in some articles and have sent you others not ordered. I leave it with yourselves to take the whole of the two shipments or none at all, just as you please. If you do not wish them I will thank you to hand the invoices and letters over to Messrs. Falconer & Co. I think 24 hours will allow you ample opportunity to make up your minds on this point; and if you do not hand them over within that time, I will, of course, consider that you take the whole."

It was argued on behalf of the claimants that by the invoice and bill of lading and the letter above quoted the property was vested in the New York firm liable to be divested by their rejecting the consignment, within 24 hours after receiving the letters; that the condition annexed to the transfer was subsequent, not precedent.

It was held however that the property did not vest in the consignees *until they had exercised their option.*

This Court said at page 356:

> "Had Thomson (the shipper) in execution of the orders of Dunham and Randolph (the consignees) consigned unconditionally such goods as they had directed, the contract would have been complete, and the goods would on being shipped have become the property of Dunham and Randolph. But Thomson has not done this. With the goods which were ordered he has consigned other goods, expressly stipulating that Dunham and Randolph shall not take the goods they had ordered, *unless they consent to take the whole quantity put on board both vessels.* This then is a new proposition on which Dunham and Randolph *are at liberty to exercise their dis-*

cretion. They may accept or reject it; *and until they do accept it, the property must remain in Thomson.* The sentence of condemnation, therefore, in this case, was warranted by the evidence before the Circuit Court."

In *Hopkins* v. *Davis*, 23 App. Div. 235, 236-237, the owner of a mare parted with her possession to a prospective purchaser under an agreement that the latter would train her, enter her in races, and if she won any stakes in the first three races in which she started, he would pay for her a price named. It was held that the purchaser obtained no title unless he made full payment and the owner was entitled to maintain replevin for the mare against one who had acquired her from the original vendee.

The Court said:

> "*It was at most an executory contract of sale*, only to be effective upon the contingency that the mare should in the first three races succeed in winning some portion of the stake. In case she did not succeed in winning some portion of a stake, there was no agreement whatever between the parties for her sale. Unless credit be expressly or impliedly given, the law presumes that payment is to be made in cash upon the delivery of the article sold. This right may be waived by the vendor by making delivery without exacting payment".

In *Dunnigan* v. *Crummey*, 44 Barb. 528, an agreement was entered into between the plaintiff and defendant for the sale of a machine by the plaintiff to the defendant, and there was a delivery and an acceptance of a portion of the machine. That portion of the machine not delivered was taken by the plaintiff to a machine shop, at the request of the defendant, for the purpose of being cleaned, which was to be done at the joint expense of both parties. After the cleaning was completed, it was paid for by the plaintiff and that portion of the machine taken by him and tendered and offered to be delivered to the defendant.

While it was held that there was a valid sale of the machine, and not merely an executory contract of a sale, where something remained to be done on the part of the vendor before the delivery of the property, the Court said at page 533:

> "In *McDonald* v. *Hewett* (15 John. 349) Spencer, J. lays down the following rule: *'The distinction between executory and executed contracts is well defined.* The former conveys a chose in action, the latter a chose in possession,' (citing several authorities). *'The decisive test, in cases of this kind, is to consider at whose risk the subject of the contract was.'* It should also be observed that the doctrine in regard to contracts being executory where some act remains to be done, mainly relates to cases where no portion of the property has been delivered".

In *Cunningham Iron Co. v. Warren Manufacturing Co.*, 80 Federal Reporter 878, 879, it was held that an agreement for the sale of steam boilers then in place in a factory, which provided that they shall be taken out and delivered before a certain time, was *an executory* contract and was not rendered operative to pass title by a statement in the memorandum of sale that the vendee "*purchased* the * * * boilers".

The Court said:

> "From the fact that the boilers were in use and bricked in at the defendant's factory, to be taken out by the defendant, at such time prior to November 1, 1895, as the defendant chose, I am of the opinion that *the contract was an executory contract, which did not pass title to the plaintiff, since something was to be done to make delivery possible,* and to be done by November 1st, which made time essential, and *gave a right to the plaintiff to rescind for failure to perform the agreement within the stipulated time. The fact that the memorandum of sale states 'Cunningham Iron co. purchased * * * the thirteen*

72" boilers' etc., does not in my opinion render the transfer of title complete, in view of the foregoing facts. *Hatch v. Oil Co.*, 100 U.S. 124; *Jones v. U.S.* 96 U.S. 24, 28".

In *Anderson v. Read*, 106 N. Y. 333, 344, it was held that the word "sold" in a contract of sale of chattels does not necessarily import an *executed* contract; that where, by the terms of the contract, some material act remains to be done by the vendor before he can insist upon making delivery *or can claim payment*, such word is to be construed as meaning "contracted to sell", and the contract is merely an executory one.

The Court said:

"We are quite clear that the contract in question was *executory*, and in that respect we differ from the learned trial judge.

"It is true that the contract uses the words 'we have today *sold* to Messrs. R. W. L. Rasin,' etc. *But that language must be construed in connection with the rest of the contract, which must be taken as a whole, and such construction placed upon it as the language used in the entire instrument calls for.* Looking at the contract in this light, it will be seen there are two facts which render it entirely clear that it is in its nature *a purely executory* one. One fact is, that there was to be an analysis of the superphosphates by a New York or a Georgia chemist before delivery or payment, as provided for by the contract, could be insisted upon. Perhaps the vendee might, if he chose, waive the analysis and trust entirely to the guarantee and thus accept delivery without it. *But the vendor could not compel an acceptance or claim payment without an analysis, and therefore, no title passed upon the signing of the agreement.* In this respect there is no material distinction between this case and *Russell v. Nicoll* (3 Wend. 112). The language there used was '*sold* by Daniel Rapelye', *etc.* But because *upon a perusal*

of the whole contract it was clear that the property sold was to arrive in New York before a certain date *as a condition of the sale,* the court said that such arrival must precede the change of title, and that the contract was executory; that the word *sold* used in the contract meant contracted to sell. It is the same here. The word used means the same— *'contracted to sell'*, because some material act had yet to be performed by the vendor before he could insist upon making delivery or claim payment for the goods."

In *Decker* v. *Furniss,* 14 N. Y. 611, 615, the Court said:

> "The question then is, whether the written agreement concerning the vessel passed the title to one-half immediately to the defendant, and this inquiry is by no means free from difficulty. There is no doubt that the phrase which stands at the commencement of the contract, 'William H. Brown *sells*' etc. imports of itself an executed sale. But the books furnish abundant evidence that phrases of this kind are used in a very loose sense, and that *their literal signification is often overruled by the tenor and purpose of the whole instrument.* So a party to a contract may say 'he agrees to sell', and yet the intention be entirely manifest that the title shall pass immediately. *Such phrases are quite inconclusive, and are often made to yield to other terms of the contract evincing a different design*".

Again, page 619:

> "I AM INCLINED TO REGARD THE CONTRACT AS WHOLLY EXECUTORY, ALTHOUGH THE WORD 'SELLS' IS USED IN THE FIRST CLAUSE, WHICH, IF STANDING ALONE, WOULD IMPORT A PRESENT, UNCONDITIONAL SALE, AND SO FAR AN EXECUTED AGREEMENT. *But it is connected with other terms and provisions,* leaving it quite satisfactory to my mind that it was not the intention of the parties that there should be a

joint ownership of the vessel until she was fitted and ready for the joint adventure contemplated by the agreement".

In *Hatch* v. *Oil Company,* 100 U. S. 124, 131, this Court said:

> "If the *property* by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only pass to the buyer at a future time *or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement.* Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say, that whenever a controversy arises in such a case as to the true character of the agreement, *the question is rather one of intention than of strict law,* the general rule being that the agreement is just what the parties intended to make it, *if the intent can be collected from the language employed, the subject matter, and the attendant circumstances.*"

While in the English prize cases and in certain of the American ship cases it has been said that mere intent to avoid capture is not sufficient, we have, we submit, demonstrated that in the case at bar there was more than the intent to avoid capture; that THERE WAS THE INTENT TO RETAIN THE PROPERTY IN THE LEIPZIG COMPANY; THAT THERE NEVER WAS IN FACT ANY INTENT TO MAKE A GENUINE TRANSFER; that the seller did not part with ITS BENEFICIAL INTERESTS IN THE PROPERTY, and never intended to, and that, tested by all the rules, THE CONTRACT NEVER BECAME EXECUTED IN ANY PART OR RESPECT.

POINT V

The contract became void and was abrogated and dissolved on April 6, 1917, when the United States declared that it was at war with Germany

I

A large part of the support which the United States gave to the allies in the war was financial. All of the belligerents were directly concerned in maintaining their credit and the parity of exchange during the war, not only in Europe but in South America and the Orient. Anything which promoted the business and financial interests of enemy countries or citizens or subject of enemy countries, including the maintenance of their credit, was a military advantage, and anything which lowered their credit was a military disadvantage. In a war of world-wide extent the old forms of trading with the enemy, *involving largely the physical transfer of tangible goods,* became obsolete. The entry of the United States into the war, followed by a general embargo, went far to put a stop to the surreptitious smuggling of goods into Germany through the territories of contiguous neutrals. *The war was fought with money as well as with men.* It was a great advantage to Germany to keep up the purchasing power of the mark. Anything which would tend to beat down the value of the mark was of advantage to the Allies and to the United States.

The Trading with the Enemy Act was approved October 6, 1917. It was the subject of careful consideration by both the House and the Senate.

The report on the *Act* submitted to the Senate August 15, 1917, by the Senate Committee on Commerce contains a summary of the provisions of the *Act,* and a brief digest of (*a*) the American trading with the enemy cases, and (*b*) the "English cases during the present European war". We quote from the report as follows:

"Trade with the enemy is unlawful under the common law both in England and the United States. (See memorandum of American cases submitted as an appendix) In England it has always been a common law criminal offense (*Regina v. Castro* (1880), 5 Q. B. D., 490). In the United States, so far as such trade is criminal, it must be made so by Federal legislation, there being no common law of crimes. Such trade has a civil aspect—being unlawful, the acts of all parties engaging in such trade are void, or their rights and remedies are suspended during the war. * * *

"The questions of what constitutes trade with the enemy and what constitutes an enemy within the purview of the illegal trade are settled by the decisions of the English and of the American courts. These decisions constitute part of the common law of the two countries. *Strictly speaking, they are not founded on international law.* They are purely domestic decisions, founded on such view of public policy as the courts of each country decide to adopt, *paying attention, however, to the general concensus of other countries as to what shall constitute a wise public policy in dealings affecting outside countries.*

"It follows that when the legislature of a country enacts a statute relative to trade with the enemy containing provisions differing from the law laid down by the courts, *it is not violating or departing from international law.* It is simply expressing its views as to the need of change in the domestic law of the country. Each country must decide for itself what it shall regard as unlawful trade with the enemy, and also what persons it shall regard, for the purposes of such trade, as enemy.

"Changes in economic, commercial, financial, military, naval, and political conditions may make it highly necessary that doctrines as to trade with the enemy laid down by our courts *a century ago* should be modified by the legislature either by mak-

ing them more stringent or less stringent, according to the needs and conditions of the present day. The complexity of modern business demands *far greater stringency in certain directions* than the old cases decided by the Courts provided for. On the other hand, the more enlightened views of the present day as to treatment of enemies make possible certain relaxations in the old law.

"In former days, trade consisted wholly in the actual transfer and transport of commodities. To-day a form of trade even more helpful to the enemy consists of transfer of credits and money by letter, cable, or wireless. Hence, while formerly the mere accumulation of enemy property or funds in this country did not assist the enemy materially, so long as it remained here, NOW WITH THE READY EASE BY WHICH CREDITS MAY BE TRANSFERRED AND FUNDS USED IT BECOMES JUST AS IMPORTANT TO PREVENT AN ENEMY FROM BUILDING UP, USING, OR TRANSFERRING HIS CREDIT OR CREDITS AS FROM ACTUALLY TRANSFERRING PHYSICAL PROPERTY. HENCE MUCH MORE RIGID SUPERVISION OF SUCH TRANSACTIONS BECOMES NECESSARY. * * *

"It is necessary always to bear in mind that a war cannot be carried on without hurting somebody, even, at times, our own citizens. The public good, however, must prevail over private gain. As was said in *Bishop v. Jones* (28 Texas, 294), there can not be 'a war for arms and a peace for commerce'".

It would unnecessarily extend this brief to attempt to digest, or even refer to, all of the decisions on the effects of war on contracts made before the countries with whom the contracting parties were nationals became enemies. Most of the cases down to 1915 are digested in the supplement to Trotter's work on *The Law of Contract during War,* revised edition London, 1915, in particular, *Section 12* relating to "executory contracts made with an alien enemy before the outbreak of the war", pages 45 to 60

inclusive, which contains a rather full reference to most of the old American cases.

Moore's Digest of International Law, Volume VII, 1906, contains a digest of the cases decided down to 1905 (pages 237 to 254, Sections 1135-1140).

It is unnecessary to digest the old American and English cases and a full consideration of the recent decisions of the English Courts during the German war is also unnecessary.

It is enough to say that *all executory contracts become invalid on the breaking out of war.* The two latest and best English cases are the *Zinc Corporation, Ltd.*, v. *Hirsch* (1916) 1 K. B. 541, and *Bieber & Co.* v. *Rio Tinto Co.* (1918) App. Cases 260, House of Lords.

As was said in the case of *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft,* (1918) 1 K.B. 331, prior to the outbreak of the German war, the law as to intercourse between enemies and the effect of war on contracts was but little understood. What the Court said on that subject (page 337) is significant:

> "It must be remembered that in 1912 the state of the law as to intercourse between enemies and as to the effect of the outbreak of war on contracts was but little understood. Lawyers were in doubt and laymen in confusion as to the law when events of August, 1914, broke out. Much argument was needed and several decisions were required ere the law as it now stands was settled".

That case was decided before the decision of the House of Lords in the case of *Ertel Bieber & Co. v. Rio Tinto Co.,* (1918), A.C. 260, herein referred to.

When the *Naylor case* (*supra*) came before the Court of Appeal on June 26, 1918, the Court, (Pickford, L.J.) said:

> "After the judgment of the House of Lords in *Ertel Bieber & Co. v. Rio Tinto Co.* this case is unarguable. The appeal will therefore be dismissed".

Naylor, Benzon & Co. Ltd. v. Krainische Industrie Gesellschaft (1918) 2 K.B. 486.

It is not too much to say that the decisions of the English courts in the *Zinc* case and in the *Rio Tinto* case have clarified to an extraordinary degree the law on the entire subject. They disregarded all technical tests, and completely swept aside as utterly irrelevant the confusing distinctions based on some early and not well-reasoned decisions, as to *executed* and *executory* contracts, and laid down one plain, clear and final rule, and that is, THAT ALL CONTRACTS, THE FUTURE PERFORMANCE OF WHICH MIGHT INVOLVE TRADE OR INTERCOURSE WITH AN ENEMY BECAME ILLEGAL AND VOID ON THE OUTBREAK OF WAR, AS CONTRARY TO PUBLIC POLICY.

The following is an accurate statement of the principles of law established by the English cases:

A contract is abrogated by the war which either involves or MIGHT involve intercourse with the enemy or the continued existence of which is in any other way against public policy as laid down in the decided cases. *Zinc Corporation Limited v. Hirsch* (1916) 1 K. B. 541; *Naylor, Benzon & Co. Limited v. Krainische Industrie Gesellschaft* (*supra*); *Ertel Bieber & Co. v. Rio Tinto Co.* (*supra*).

Where the suspension of the contract during the war and its revival after the war would be in effect to create a new contract between the parties, THE CONTRACT IS DISSOLVED BY THE WAR. *Distington Hematite Iron Co. Limited v. Possehl & Co.* (1916) *1 K. B. 811; Naylor Benzon & Co., Limited, v. Krainische Industrie Gesellschaft* (*supra*).

It is immaterial whether the contract between the subject or citizen and the enemy is beneficial to the citizen or subject or not. *Naylor case* (*supra*); *Ertel Bieber case* (*supra*).

Because of the admirable grasp of principles, because of the lucidity with which those principles were applied, because of the superb disregard of mere technicalities shown in those great English cases, we have taken the liberty of making a rather full digest of them in the appendix of this brief.

While we think that the rules laid down in the late English cases are the sound ones and state the true and the wise view of the great questions of public policy involved, it is not necessary for this Court in this case to go the full length of those decisions in order to hold that the contract became void and was dissolved on the outbreak of war. The English Courts in those cases held that all contracts that *"might"* involve intercourse with the enemy were dissolved on the outbreak of war. They disregard the limitation implied in the word "commercial". They hold that any contracts that MIGHT involve intercourse with the enemy, and not merely contracts that NECESSARILY involve intercourse with the enemy, become void and are dissolved on the outbreak of war.

Some old decisions of our Courts did not go that far and seemed to limit the doctrine to the *commercial* intercourse, as in the case of *Williams vs. Paine*, 169 U. S. 55, 70 (1897).

The case of *Kershaw vs. Kelsey*, 100 Mass. 561, is frequently quoted as an illustration of the so-called "suspension theory". But even that decision expressly recognized the rule condemning "commercial intercourse", for Mr. Justice Gray there said, at pages 572-573:

> "The law of nations, as judicially declared, prohibits ALL INTERCOURSE BETWEEN CITIZENS OF THE TWO BELLIGERENTS WHICH IS INCONSISTENT WITH THE STATE OF WAR BETWEEN THEIR COUNTRIES; and that this includes any act of voluntary submission to the enemy, or receiving his protection; AS WELL ANY ACT OR CONTRACTS WHICH TENDS TO INCREASE HIS RESOURCES; AND EVERY KIND OF TRADING OR COMMERCIAL DEALING OR INTERCOURSE, WHETHER BY TRANSMISSION OF MONEY OR GOODS, OR ORDERS FOR THE DELIVERY OF EITHER, BETWEEN THE TWO COUNTRIES, DIRECTLY OR INDIRECTLY, OR THROUGH THE INTERVENTION OF THIRD PERSONS OR PARTNERSHIPS, OR BY CONTRACTS IN ANY FORM LOOKING TO OR INVOLVING SUCH TRANSMISSION, OR BY INSURANCES UPON TRADE WITH OR BY THE ENEMY."

While it is true that in that case Mr. Justice Gray said that "the more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned", yet under the DECISION in *Kershaw v. Kelsey* the contract in the case at bar became void, for it involved, ***and necessarily involved,*** "commercial dealing or intercourse"; it involved ***"a contract which tended to increase"*** the enemies' resources, for to uphold it would preserve the resources of the enemy during the war and take that much resources from the United States during the war.

Mr. Justice Gray expressly referred to ***"contracts in any form looking to or involving such transmission."*** The contract in the case at bar was precisely such a contract, FOR IT CONTAINED NO PROVISION THAT IT SHOULD BE SUSPENDED DURING THE WAR.

A reference to the digest of the late English decisions, in the appendix to this brief, will show that the English Courts have held that EVEN WHERE THE CONTRACT CONTAINED EXPRESS PROVISIONS FOR SUSPENSION DURING WAR, it was abrogated on the outbreak of war, on the grounds of public policy, as tending to increase the resources of the enemy available after the war or tying up the resources of English nationals during the war.

In *The William Bagaley,* 5 Wall. 377, 407 (1866) this Court said:

> "Executory contracts with an alien enemy, or even with a neutral, if they can not be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress."

To the same effect are *Gates v. Goodloe,* 101 U. S., 612. 619-621 (1879); *Lamar v. Micou,* 112 U. S., 452, 464 (1884); *United States v. Dietrich,* 126 Fed. Rep., 671, 674 (1908).

Also *Griswold v. Waddington*, 10 Johns. 438 (1819); *Abell v. Insurance Co.*, 18 W. Va., 406, 438 (1881); *Moore's International Law Digest*, volume 10, page 244.

We will now consider briefly the contract as tested by the law affecting contracts that involve intercourse with an enemy.

II

The Court will look at the things contemplated by the contract and the rights and options of the parties as provided in the contract *and not to any one isolated provision or fact*. It was not a mere debt that was created by the contract. Many things had to be done before the final liquidation of the amounts to become due under the contract. The performance of the contract was not to be suspended during the war. To carry out during the war any part of the contract would necessarily involve *commercial* intercourse with the enemy and would be illegal.

Among other things, the contract contemplated the payment of the purchase price by the New York company in annual payments of one-fifth of the purchase price measured by the book value of the stock plus dividends.

Any such payment would be illegal during the war. The first instalment was payable February 20, 1918. To have made that payment would have been clearly illegal.

The second instalment would be payable February 20, 1919. To make that payment would involve commercial intercourse with the enemy and would of course be illegal.

The third instalment would have become due February 20, 1920, and, though it would *now* be legal to make that third payment, this anomalous situation would be presented: that the first two payments would have been illegal, that to have made them would have been a crime, and hence that the contract itself was illegal and was void and abrogated upon the outbreak of war on April 6, 1917. So the third payment of February 20, 1920 never could become due. The fact that on February 20, 1920 it was permissible to remit money to Germany is immaterial. If it

be argued that the first and second payments payable February 20, 1918 and February 20, 1919 were suspended, the answer is: that the contract did *not* provide that *any* of its terms should be suspended during the war. If it had attempted so to provide, it would have been wholly illegal *on that ground alone*, and would have become void and dissolved on the outbreak of war, as is demonstrated in the two great English cases, *the Zinc case* and *the Rio Tinto case*, which are considered in the appendix.

The contract contemplated the delivery by the Leipzig company of certificates for one-fifth of the stock to the New York company on each annual payment. Those deliveries on or after February 20, 1918 and on or after February 20, 1919, following the assumed illegal payments by the New York company to the Leipzig company, would have involved *commercial* intercourse with the enemy and would be illegal.

The contract provided that, in the event that any of the annual instalments should not be paid when due, the Leipzig company should notify the New York company *in writing* that it required the payment of the instalment then due. Such a notification would involve *commercial* intercourse with the enemy and would be illegal.

The contract contemplated that in the event that the New York company should not within sixty days after such a demand pay the instalments so demanded, then the shares of stock, or any remaining balance of those shares, should be forthwith "*retransferred*" to the Leipzig corporation upon the books of the Botany. Such a transfer would involve *commercial* intercourse with the enemy and would be illegal.

Both of those provisions involved the exercise of rights by the German company. *Options* were given to the German company which rendered the whole agreement unlawful.

The measure of the purchase price was to be "the book value of such shares as shown by the books of the Botany Worsted Mills." That would involve *commercial* intercourse with the enemy. The giving of notice was involved in the fixing of the purchase price, if it were an honest

contract. It would be illegal for the New York company to give such notice during the war. The giving of such notice would constitute *commercial* intercourse. On the other hand, the giving of notice by the Leipzig company to the New York company would be the exercise of a right given to the Leipzig company by the contract and would be illegal.

The contract provided, article second, subdivision (c) that in arriving at the amount of each instalment for each of said years "the net worth of the hard assets of the Botany Worsted Mills, after deducting the total liabilities, shall be taken as the basis of the computation of the value per share and no allowance or increase shall be made on such instalment for good will." That also would involve the adjustment of accounts and would, if the contract were an honest and *bona fide* contract, involve *commercial* intercourse with the enemy and would be illegal.

Article fourth provided that "the New York company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig company, with a bank or trust company to be selected by the Leipzig company, such deposit to be made with such bank or trust company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid, or (in case of nonpayment of any instalment) until the Leipzig company shall be entitled to such stock under the provisions of paragraph fifth of this agreement."

That also would involve the exercise of a right by the New York company, and also the exercise of a right by the Leipzig company, the giving of notice *by* the New York company *to* the Leipzig company and the giving of notice *by* the Leipzig company *or* the bank *or* trust company selected and approved *by* the Leipzig company *to* the New York company. The giving of any such notice would of course be *commercial* intercourse during the war and would be illegal.

No certificate was given even by wireless *by* a director resident in Leipzig regarding the transfer of the shares to the New York company *to* the treasurer of the Botany in

Passaic as required by the by-laws. No "advice", of course, was sent, even by wireless, by the treasurer in Passaic *to* the director in Leipzig, as required by the by-laws. The giving of such a certificate after April 6, 1917 would, of course, involve commercial intercourse and would have been illegal.

In view of the undisputed fact that the Leipzig company *never knew* of the contract and, of course, never authorized it up to April 6, 1917, the receipt of such a certificate *after* the war and the giving of the "advice" by the treasurer of the Botany in Passaic *to* the director in Leipzig, which were two vital things to be done to comply with the express requirements of the by-laws, and which remained unperformed on April 6, 1917, would, if done *after* April 6, 1917, have involved *commercial* intercourse with the enemy and on that day became illegal and if done *after* the enactment of *The Trading with the Enemy Act* would have been a punishable crime.

On the face of the contract, the result of preserving intact for the New York company and for the Leipzig company, as the contract attempted to do, all the rights to the 14,900 shares and to the payment of the purchase price thereof to the Leipzig company, would be to protect the Leipzig company's trade during the war and would enable the Leipzig company, upon the conclusion of peace, to obtain payment from the New York corporation. Or else, to uphold the contract would enable the parties to carry out the secret intention to return the stock to the Leipzig company when it was thought safe to do so. On either aspect to sustain the contract would diminish the effect of war on the commercial trade of the enemy country which it was the object of the United States during the war to destroy.

To recognize the contract and to give effect to it, by holding that it remained legally binding upon the contracting parties but that it was merely suspended, as contended by counsel for the appellant (in point IV of his brief, page 78) and that it defeated the right of capture by the United States, would be to defeat the great principles of public

policy adopted by the United States in *The Trading with the Enemy Act* for the purpose of crippling the trade and commerce of the common enemy.

The contract was one which could not be performed during the war. As was said by Bray, J. in the *Zinc case*: "If the performance of *any term* of the agreement *or the exercise of any right or option* given by it be rendered unlawful, the whole agreement is dissolved. The court cannot substitute for the agreement made by the parties any agreement minus any one of its terms. The parties have never so agreed." (1916) I K.B. 541, 548.

If the exercise of options as contemplated by the contract, the giving of notices, the forfeiture of rights, the delivery of shares, the fixing of the purchase price and the payment of the purchase price all became illegal April 6, 1917, then the Court cannot "substitute for the agreement made by the parties an agreement minus any one of its terms."

It cannot be contended, as it was in the *Zinc case*, that the parties intended that the operation of the contract should be *suspended during the war*. The contract was made in express view of the war. It bears on its face the demonstration of the *intention of the parties*. The Heyn and Stoehr letters remove all doubt on that subject. And yet, though it was made upon the eve of war and with direct relation to war, the parties did *not* provide that the rights should be suspended during the war. That feature of the *Zinc case* is not in this case. Hence the parties expressly intended and provided for certain things to be *done during the war*. Inasmuch as there was no provision in the contract providing for the suspension of rights or the suspension of any parts of the contract or the suspension of the contract as a whole during the war, the principle applies that as the performance of the contract during the war would have involved *commercial* intercourse with the enemy, upon the outbreak of the war it became illegal and was dissolved.

What results from that? The result is that the ownership, the beneficial interest, and the legal title to the shares were in the Leipzig company on April

6, 1917 and remained there until *The Trading with the Enemy Act* was passed and until, under that *Act*, the rights of the Leipzig company as an alien enemy and its ownership of, and beneficial interest in, those shares were demanded and seized by the Alien Property Custodian and so passed to the government of the United States.

The dissolution of the contract by war was specially pleaded by all the defendants.

III

Assuming that an equitable right had passed to the New York company, what was the effect of dissolution of the contract on outbreak of war?

In Point I of his brief (pages 16-17) counsel for the appellant, referring to the transfer of the shares on the books of the Botany company, said: "Irrespective as to whether or not these acts vested in the New York company *the legal title*, it certainly conferred upon it the equitable title." In Point IV (page 77) he refers to "the *executed* contract". On page 78 he tries to distinguish the *Zinc Case* and the *Rio Tinto Case* by the argument that in both of those cases the contracts were executory, and then, implying that in the case at bar the title had passed, he says: "In neither of them was the question presented as to whether the *title to property had passed* from the vendor to a vendee not an enemy or the ally of an enemy."

Again in Point IV (page 77) he argues that the *"debt* of the New York company to the Leipzig company was subject to capture and seizure". As there was no delivery of the stock, there never became any *debt* to capture or seize. There could not on any theory be any *debt* until there was a demand for the payments, and the New York company was not required to pay except upon a delivery of the certificates.

His further statement (page 78) that "consequently the performance of the obligation to pay was suspended", is disingenuous, for there was no "obligation to pay" upon

the New York company from the beginning to the end of the contract. In other words, *there was no debt.*

But further in Point IV of his brief (page 81), apparently forgetful of the concession that he had made in Point I, (pages 16-17), counsel for the appellant boldly states: "In the present case the *title* to the 14,900 shares of stock of the Botany Worsted Mills *passed at once* from the Leipzig company to the New York company on February 20, 1917." He then argues that the "payments *to be made*" by the New York company "could of course not be made while the war was pending", to the Leipzig company. He then argues that "the *debt* for the purchase price * * * came into existence concurrently *with the passing of title*".

That is a complete perversion of the terms of the contract. No *debt* came into existence on February 20, 1917. There was *then* no *present obligation* assumed by the New York company to make any present payment. That there was no debt appears all over the contract, but it is shown conclusively by the one fact alone that there cannot be a debt without a fixed or liquidated amount, and there was no amount fixed in the contract but only a method of computing an amount in the future.

In Point IV (page 82) counsel for the appellant further says: "It would be most extraordinary if the appellees' contention should be sustained, namely, *that although title to property may have passed, before the declaration of war,* to an American corporation or to an American citizen from a German subject, that title would be divested if the vendee was not called upon by the terms of the contract to make payment in whole or in part prior to the declaration of war."

The appellees do *not* contend or admit that *"title to the property passed"*.

The appellees do *not* claim that title "would be divested".

If by the words "title to the property passed" counsel meant to refer to "beneficial ownership," then the answer is that no beneficial ownership or equitable title or right passed to the New York company. But even assuming, which is not conceded, that a beneficial title, right or in-

terest did pass to the New York company, then the contract was so far executory and necessarily involved such commercial intercourse with the enemy during the war, that it was dissolved and abrogated on the outbreak of war.

There was no transfer of the legal title. As the bylaws were not complied with, as there was no assignment from the two Stoehrs who were the trustees of the 14,900 shares, as there were no transfers executed by them, no part of the contract became executed. But even if it be conceded that there would have been, had there been an intent to contract and authority to contract, a transfer of *beneficial interest* under the contract, that would leave so many executory features of the contract to perform, that would necessarily involve such commercial intercourse with the enemy, that the contract would be voided and dissolved upon the happening of war.

IV

The entire argument of counsel for the appellant in Points I and IV of his brief, based upon a theory of "equitable title", is fallacious. A contract either conveys legal title or it does not. If the intention of the parties is to make a conveyance in the future, then no legal title presently passes. What the promisee gets is a *right* to a title in the future which may be the basis for a decree of specific performance. But he gets no *equitable title* in the true sense of these words. He gets an equitable *right*, a *right enforceable in equity*, by specific performance for example, but he gets no *equitable title* in the proper sense of these words. While it is true that in the sales cases the Courts frequently, but, we submit, loosely, use the words "equitable title", where they hold that there was an intention to transfer the legal title, but where that intention was not carried out, the correct statement of the principle would seem to be that such a promisee gets an equitable *right* to the legal title, a *right enforceable in equity,* if no superior legal rights, acquired in good faith, intervene.

Some of the authorities use the words "equitable *interest*" in reference to transfers of stock, but again the correct phrase is "equitable *right*." In cases of shares of stock, the equitable right is a right, "coupled with an irrevocable power to acquire the *legal* title". As stated by Professor Ames (Volume II, *Cases on Bills and Notes*, 784): "This view avoids the objection of disregarding the language of the statute prescribing the mode of transfer and also explains the decisions in *Redfern vs. Ferrier*, 1 Dow, 50, and *Dodds v. Hills*, 2 H. & M. 424, where a purchaser for value from a trustee of stock without notice of the trust was allowed to retain the stock, although before registration he learned of the trust."

Hence, in the proper meaning of the phrase, no "equitable title" vested in the New York company. The New York company having only such an equitable *right* (assuming such a right for the purpose of the argument), that *right* was only a right in the nature of a *contract right*, was purely executory, and to turn it into a legal title would necessarily involve commercial intercourse with the enemy, and hence that *right*, if any existed, was abrogated and rendered null and void on the outbreak of war.

We have shown that there never was any legal title in the New York company. The physical entry of the shares on the books of the Botany in the name of the New York Company was in no sense a vesting of the legal title in that company. Hence the Alien Property Custodian had a perfect right, in the exercise of his powers, to demand that the shares on the books of the company be transferred to him, which he did and which was done.

V

At the beginning of point IV of his brief counsel for appellant argued that "the status of the property is precisely the same as it would have been had it been a parcel of real estate located in New Jersey and conveyed by the Leipzig company to the New York company subject to a lien for unpaid purchase money in favor of the Leipzig company or to a mortgage to secure the unpaid purchase

price". He then again refers to *"the executed contract* under which it acquired its title".

The reference to an absolute debt secured by a real estate mortgage is quite fallacious. It needs no argument to show that an obligation on a real estate mortgage is an absolute debt. As to absolute debts, where the full title had passed, where the full consideration had been received, where nothing further remained to be done, where the result of a financial transaction was a debt and nothing but a debt, it may be that such an absolute debt would not be abrogated and that it would, but for the provisions of *The Trading with the Enemy Act,* under the old decisions, be suspended during the war. But such a debt could be captured under the provisions of the *Act* and the absolute unconditional amounts due to the enemy would be payable to the Alien Property Custodian.

In the summary of his point IV (page 77) counsel for the appellant states that the shares of stock "were to be redelivered from time to time as the instalments of the purchase price *were paid".* But that very statement, in the very headnote of said point, contradicts his argument in that point that the obligation of the New York company was the same as "a liability on a promissory note for goods sold and delivered" (page 82). The "goods" in this case, assuming that they were "sold", which was not the fact, were certainly "not delivered". There were elaborate provisions for the future delivery of the shares on the one side and the payment therefor on the other, constituting such a contract as inevitably required commercial intercourse with the enemy. Such a contract, under the doctrine of the *Zinc Case* and the *Rio Tinto Case,* became totally abrogated and void on the outbreak of war.

Counsel for the appellant has misconstrued the effect of those two great English cases.

At pages 79-80 of his brief he quotes from the opinion of Lord Justice Swinfen Eady the following:

"The contract of 1910 not only provided that the defendant shall purchase the plaintiff's whole production, but it also stipulates that the plaintiff shall not sell their

concentrates to any other person. *This negative stipulation remains in force according to the tenor of the agreement as well during a war as during a temporary strike or accident or breakdown of machinery".*

But he omits to state that in making those statements the Lord Justice was merely summarizing *the tenor of the agreement,* and that on the very next page he held (1916, 1 K. B. 558-559) that:

"To recognize such a contract during war and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy. * * * I am of the opinion that the contract in question became dissolved on the outbreak of war and that the judgment below was right, and that this appeal fails".

The statement in appellant's brief (page 78) that the performance of the obligation to pay was suspended, begs the entire question. The obligation to pay was not such a debt as is suspended during war.

POINT VI

The seizure of the 14,900 shares under the provisions of The Trading with the Enemy Act was not in violation of the due process provisions of the constitution

In Point VI of his brief (pages 95-101) counsel for the appellant argues that the act of the Alien Property Custodian in seizing the shares "*ex parte* and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court" to the New York company, was null and void and "in violation of the due process of the Federal constitution".

The first obvious fallacy in the plaintiff's argument is that it *assumes* that the title to the shares was in the New York company. The Court below having held that no title or right passed to the New York company, it followed that the New York company had been deprived of no title or rights by the seizure and so the bill was dismissed on the merits. If this Court shall affirm the judgment entered

upon the decision of the Court below, on the ground that no title or right vested in the New York company or that the contract was abrogated and became void on the happening of war, the New York company will have been deprived of no constitutional right by the seizure of the Alien Property Custodian. If, on the other hand, this Court should reverse the judgment, the decree will be, pursuant to Section 9 of the Act, for the return of the property to the New York company.

In his supplemental bill the plaintiff claims under Section 9. But in the main bill the plaintiff pleaded the unconstitutionality of the Act. The plaintiff therefore has no standing unless it be under Section 9 or unless the Act be unconstitutional.

The first cases cited by counsel for the plaintiff are *McVeigh v. U. S.*, 11 Wallace 259, *Windsor v. McVeigh*, 93 U. S. 274, and other cases. Those cases do not sustain the appellant's contention. They arose under the Civil War confiscation acts. Those cases and the cases of *Risley v. Phoenix Bank*, 83 N. Y. 318, and *Chapman v. Phoenix Bank*, 85 N. Y. 437, and the other cases referred to on page 96 of counsel's brief, are not in point. They held merely that unless the Act was complied with the seizure was illegal. The point is well brought out in the opinion of Judge Hand in the case at bar, where he held that the Civil War confiscation cases "were not pertinent", and said:

"They arose under the Civil War Confiscation Acts which did not forfeit the property of all Confederates by virtue of their status, but of only six specified cases. There was no way for a claimant, even though an avowed Confederate, to prove that he was not within those classes except by appearance in the suit. To strike out his appearance *in limine*, on the ground that he was an enemy, as was done, was therefore to deny him the legal procedure accorded him by the statute. Section nine is the precise equivalent of this right, at least so far as concerns claimant friends, who are alone concerned here. The sole basis for the plaintiff's claim of unconstitutionality comes down, therefore, to the Custodian's power of initial sequestration

ex parte. But how does this differ in substance from the customary right upon libels of information *in rem* to arrest whatever property officials may decide to be forfeit? Such property may not be reclaimed *pendente lite* by filing a bond; the claimant must endure the temporary loss of possession until the innocence of the *res* is adjudicated. The public purpose of the statute so far overrides this incident of his rights of property. How much more is this the case in time of war where the interests are vital? The difference is one merely of procedure, the substantial rights are the same, for capture effects no more than an arrest *in rem*. The right to sell is the only addition and I have shown that this is at least subject to the judicial control in the event of a bill filed under Section Nine. The act therefore affords a complete remedy to all claimant friends, and is constitutional. As to claimant enemies, I have already considered its validity in Kahn v. Garvan, 263 Fed. R. 909, but the point does not arise here" (page 311; folios 534-535).

The argument of the complainant that the *Act* is in violation of the fifth amendment is conclusively disposed of in *Miller v. United States*, 11 Wallace 268, 304-305.

In that great case it was held, and the decision remains law today—unchanged in any respect—that legislation respecting the capture of enemy property on land is a legitimate exercise of the *war powers of Congress under the constitutional provisions conferring upon Congress the power to make rules respecting captures on land and water*, and AS SUCH IS NOT SUBJECT TO THE RESTRICTIONS OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

In that case this Court said:

> "It remains to consider the objection urged on behalf of the plaintiff in error that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offences against the sovereignty of the United States, and that they are *merely statutes*

against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; *that no person shall be deprived of his property without due process of law,* and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, **if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments.**"

The Court then went on to state that

> "It is sufficient that the right to confiscate the property of all public enemies is a conceded right",

and that legislation providing for the confiscation of enemy property wherever found is a proper exercise of the war powers of the government, and as such is not subject to the restrictions of the fifth amendment.

The *Miller case* was expressly affirmed in the case of *Tyler* v. *Defrees,* 11 Wallace, 331, and its authority has never been questioned.

In *Tyler* v. *Defrees* (*supra*) this Court said at page 346:

> "Five or six cases arising under this statute were argued before us at the last term, and, appre-

ciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at this term, and have, under that order, been ably and fully reargued. They have all been disposed of but this, and the Court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the Courts below in the cases which were here on error to those proceedings. AND WHEN WE HAVE FOUND THE PROCEEDINGS TO BE CONFORMABLE TO THE COURSE OF PROCEDURE OF REVENUE AND ADMIRALTY CASES, WE HAVE HELD THE DECREES TO BE VALID. The cases thus decided, and especially the case of *Miller* v. *United States,* in effect dispose of all the objections taken to the action of the Court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit."

The *Miller case* is authority for the proposition that Congress has *power* to confer upon the President the right to decide *in the first instance* whether the property is enemy property for the purpose of seizure.

The framers of the constitution knew the difference between capture and court process, even though counsel for the appellant pretends that the words are synononomous. The men who framed the constitution knew what war ment. THEIR OBVIOUS PURPOSE IN GRANTING CONGRESS THOSE POWERS WAS TO ENABLE CONGRESS TO WAGE WAR, UNHAMPERED IN ITS WAR POWERS BY ANY RESTRICTIONS ON THE POWER OF A SOVEREIGN STATE, AGAINST COUNTRIES WHOSE SOVEREIGN POWERS WERE NOT LIMITED BY ANY WRITTEN CONSTITUTION.

This Court has even held that an undoubted citizen of the United States can be excluded from this country by the decision of an administrative officer that he is not a citizen of the United States, and the determination of that administrative officer is conclusive upon all the Courts of the land (*United States* v. *Ju Toy,* 198 U. S., 253).

The *Miller case* (*supra*) upheld the constitutionality of the civil war confiscation acts and decided, among other things:

(a) That the seizure of the stocks in that case was properly made by giving notice of seizure to the president or vice-president of the railroad company, and that a seizure thus made by the marshal in obedience to a warrant and monition was sufficient to give the District Court jurisdiction.

(b) That stocks and credits were attachable in admiralty (the confiscation acts providing that the determination of contested questions should follow as nearly as possible the procedure in admiralty cases) by means of the service of a notice without the aid of any statute.

(c) That the confiscation acts of August 6, 1861, and July 17, 1862, were constitutional, and that, with the exception of the first four sections of the later act, they were an exercise of the war powers of the government, and were not an exercise of its municipal power; hence they were not in conflict with the restrictions of either the fifth or sixth amendment of the constitution.

In the *Miller case* this Court also said at page 306:

> "The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, WHILE AT THE SAME TIME IT FURNISHES TO THAT GOVERNMENT MEANS FOR CARRYING ON THE WAR. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation. * * * Confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership."

In *Brown* v. *United States*, 8 Cranch. 110, it was held that the exercise of the right of capture and confiscation and the agencies employed in such capture and confiscation, and the extent of capture and confiscation, rested entirely with the sovereign, and was a matter of internal policy, and that under the constitution of the United States the power to determine those great questions of policy and "to make rules respecting captures on land and water" is vested in the Congress of the United States.

In the civil war confiscation acts it was provided that there should first be a provisional seizure and then a judicial determination, following the procedure in admiralty cases as near as might be, as to the title of the seized property. Under the confiscation acts, the property was first seized by the President and was thereafter condemned and sold as enemy property, the seizure being first made by the marshal of the district, who made a return to the district attorney.

Under the present act all property which the President, after investigation, shall determine belongs to an enemy, shall be conveyed and transferred to the Alien Property Custodian (section 7(c)). Section 12 of the act, as amended, provides that the Alien Property Custodian shall be vested with all the powers of a common law trustee in respect of all property "which shall come into his possession in pursuance of the provisions of this act", *and shall in respect thereof have all the rights of an owner, including the power of sale.*

There are other differences, but that distinction between the confiscation acts and the present act disposes of the cases decided after the civil war holding that the title to property did not pass *unless the judicial procedure in admiralty cases had been substantially followed.*

The cases above relied upon by the complainant merely held that the procedure provided in the confiscation acts must be carried out.

The present act differs from the civil war confiscation acts in that those acts provided for a judicial hearing *prior to the sale.* The present act provides for seizure by the Alien Property Custodian *after investigation by him,*

and his act is the act of the President. A person claiming to be aggrieved by any seizure is given the express right under the provisions of section 9, to file notices of claim. If the claim is denied by the Alien Property Custodian, the claimant is entitled, under section 9, to bring suit in equity to establish his right, title or interest in or to the property seized.

It will thus be seen that the rights of any claimant to property seized by the Alien Property Custodian are determined, not in condemnation proceedings, as under the confiscation acts, but by a claim made or filed and suit brought under section 9 of the act, after the Alien Property Custodian has obtained title by his seizure.

While the *Miller case* is authority, which has never been overruled or questioned, for the doctrine that the confiscation acts (and, as we contend, *The Trading with the Enemy Act*) were not in conflict with either the fifth or sixth amendments of the constitution, the provisions of section 9 of the present act fully provide *for due process of law in the full sense guaranteed by the fifth amendment to the constitution.*

Section 9 was carefully framed to safeguard all the rights of any claimant to seized property, and provides for a statutory injunction until "final judgment or decree" either in favor of the claimant, or "until final judgment or decree shall be entered against the claimant, or suit otherwise terminated". It expressly provides for the making of claims to any property seized. The time to file claims is not limited, but there *is* a limitation upon the time to bring suit following the claim, for section 9 provides that "said claimant may, *at any time before the expiration of six months" after* the end of war, institute a suit in equity in the district court of the United States to establish the "interest, right, title or debt so claimed".

Counsel for the appellant quotes at length from the decision of District Judge Mayer in the case of *American Exchange Bank v. Palmer*, 256 Fed. Rep. 680, 683 (1919). The precise question decided by Judge Mayer in that case was whether a bank deposit was "property" within the meaning of Section 7(c) of the Act. The precise pro-

visions of Section 7(c) before the Court in that case were these: "Any money *or other property* * * * held by, on account of, or on behalf of, or for the benefit of, an enemy". The bill in that suit was an independent bill by the bank to interplead the Alien Property Custodian and an American citizen claiming to be the owner of the deposit which was the subject of the suit. As a matter of statutory construction we respectfully submit that Judge Mayer's opinion, holding that a bank deposit was not "property" within the meaning of the Act, was wrong. But while Judge Mayer there held that a debt such as the bank there owed was not "property" within the meaning of the Act, he did say that the word "property" as used in the Act "undoubtedly refers to a tangible *res*, or some evidence of debt, or share in property such, perhaps, as, on the one hand, a note or bill of exchange, and on the other hand, a certificate of stock or an undivided interest in real property". The point involved and decided in that case is not involved in the case at bar.

Judge Mayer there used the illustration of citizen A making and delivering his note to enemy B, but insisting that there is a defense to the note, and that he did not owe the sum represented by the note and was not liable upon the note, and he asked, without deciding, whether the Custodian could determine, without a hearing, that there was liability from citizen A to enemy B upon the note, and "therefore that there was either money or property owing from citizen A to enemy B". He intimated that the Custodian could not make such determination without a hearing. But the language used by him was a mere *dictum*, insofar as it intimated such a limitation upon the power of the Alien Property Custodian. That language must be taken to be overruled by the decision of the Circuit Court of Appeals, Second Circuit, in *Garvan* v. *$20,000 bonds*, 265 Fed. Rep. 477. In that case the Court, in holding that the Alien Property Custodian might properly under Section 7(c) of the Act apply to a District Court for aid in obtaining possession of property to which he was entitled under the Act, said:

"The trustees claimants contend that the Alien Property Custodian can seize only property belonging wholly to alien enemies; that he stands in their shoes and can get no more than they could themselves. On the other hand the Alien Property Custodian contends that, the President, having delegated his authority to him under Section 5 of the Act, HE CAN CONCLUSIVELY DETERMINE WHAT PROPERTY IS LIABLE TO SEIZURE AS BEING THAT OF AN ALIEN ENEMY.

We agree with the Alien Property Custodian and cannot read the perfectly plain language of section 7(c) in any other way. As all the facts were known and undisputed, they amounted to an investigation by the Alien Property Custodian. If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9".

And again at page 480:

"It is obviously of the utmost importance that in time of war enemy property should be put into the possession of government; on the other hand, no great harm can come to the interests of innocent persons since the possession and management of the property by the Alien Property Custodian is under the control of the President by regulation and of the Courts by decree".

In the case of *Watts v. Unione Austriaica*, 248 U. S. 9, cited on page 97 of appellant's brief, a libel *in personam* was brought by a British corporation against an Austro-Hungarian corporation in the United States District Court. The Court held that the respondent, though an alien enemy, was entitled to defend, but that in view of the provisions of the *Act*, and the fact that intercourse between the residents of the United States and the residents of Austria-Hungary was physically impossible, further prosecution

should be suspended until adequate presentation of the respondent's defense should become possible.

That was a private litigation between two aliens, one friendly and one enemy, and no question was involved of the war powers of the United States or of enemy property.

The long quotation from the decision of this Court in *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413 merely states familiar principles about due process of law, and has no relation whatever to the war powers of the United States.

POINT VII

The argument in appellant's Point V that because Stoehr & Sons Inc. was an American corporation the Alien Property Custodian was without jurisdiction to seize the 14,900 shares is unsound

Appellant's point V is made up of two sentences. The first is: "Stoehr & Sons Inc., *the owner of these shares,* being an American corporation, was not an enemy or ally of an enemy within the meaning of *The Trading with the Enemy Act".* There are two assertions in that sentence. The first, that Stoehr & Sons Inc. was "the owner of the shares", begs the primary question at issue. As we have said, if the New York company be held to be "the owner of the shares", then it follows that it will be entitled to the return of the shares. If it be held that it is not the owner of the shares, then it has no standing to question the legality or validity of the seizure, or indeed any of the acts of the Alien Property Custodian.

The second assertion in that sentence that "being an American corporation", it "was not an enemy or ally of an enemy within the meaning of *The Trading with the Enemy Act",* is obvious under the terms of the *Act* itself, and has never been disputed. His statement on page 91 that the New York company having been incorporated under the laws of New York does not come within the term

"enemy" as defined in the *Act,* is again an assertion of the obvious and is not disputed.

The second sentence in appellant's point V is: "Consequently these shares of stock were not subject to capture or seizure under its terms, and the act of the Alien Property Custodian in condemning them as enemy-owned property, upon his determination that they were such, was without jurisdiction and void".

Point V of the appellant's brief is in part devoted to *an interpretation* of the Act and not to its constitutionality. In point VI, he argues that the Act is unconstitutional on the ground that it does not provide for a judicial determination before seizure. But in point V he argues that *under the terms of the Act itself,* the seizure was a nullity because the title or a claim to title was in the New York company.

He does not question that the Alien Property Custodian made a determination, after investigation, that the shares were enemy-owned. Our position is that the fact of such investigation not being disputed, there is no question, under the proper interpretation of the *Act,* as to the validity of the seizure.

He finally comes down to the assertion that under the terms of the *Act* the seizure of the shares claimed to belong to an American corporation, was "a nullity". But before reaching that point, he makes three other assertions or arguments which, for clearness sake, will be considered first.

(1) He begins his argument in point V by the assertion that in point II he has "shown that even the property of an enemy cannot be seized on land in the absence of an Act of Congress authorizing such seizure", and cites *Brown* v. *United States.* That case is cited at the bottom of page 41 of his brief and a three-page quotation from the opinion of Chief Justice Marshall is given on pages 42, 43 and 44 of his brief. The decision in that case, and in the five cases cited on page 45 of appellant's brief, establish the principle that the right to capture enemy property on land is dependent upon congressional authority. Had there been *no* Trading with the Enemy Act those

cases would be in point in the case at bar. In view of the enactment of the *Act* by Congress and of its terms, those cases have no point in the case at bar at all.

(2) Next counsel for the appellant states (pages 89-90): "Such an act is highly penal in its character. It is in derogation of the common law. It involves a forfeiture. It contravenes the humane and wise policy which seeks to mitigate the rigors of war and to exempt individuals from punishment for the wrongs committed by their government". For those assertions he cites *Cohen* v. *N. Y. Mutual Life Insurance Company*, 50 N. Y. 610, which was also cited on page 84 of his brief, and he quotes from the decision of this Court in the case of *Mrs. Alexander Cotton*, 2 Wallace 404, 419.

From those cases he argues that "such statute must be strictly construed against the government. The soundness of this doctrine is well illustrated by decisions under the Confiscation Acts of 1861 and 1862". But this Court did not in construing these acts establish any such rule of construction. It held that "where there was a substantial departure from the mode of proceeding directed by the statute", it would reverse the decision of the Court below. *Tyler* v. *DeFrees*, 11 Wallace 331.

The seven cases cited on pages 90 and 91 of appellant's brief, which construed those Confiscation Acts, held that the property sought to be condemned must fall within one of the six classes specified in the *Act*.

(3) On page 93 he argues that the fact that a majority of the stock of the New York company is owned by enemies or is represented by voting trust certificates belonging to enemies "does not convert the corporation into an enemy within the meaning of the statute" and that "the corporation is an independent legal entity and its character is not affected by the status of the owners of even a majority of its stock", and he cites six cases. It is a complete answer to that argument that the shares were seized not because a majority of the stock of the New York company represented by voting trust certificates belonged to alien enemies but because the contract gave no title to

the shares to the New York company. It is not claimed that the ownership of the majority of the stock of the New York company by enemy aliens makes the New York company an enemy within the meaning of the Act.

Then he makes three more assertions that lead up to his final assertion that the seizure of the Alien Property Custodian was a nullity. He says (page 91) that the Act is "expressly limited in its operations to the property of an enemy and ally of enemy". On page 92 he asserts: "No property other than that of an enemy or an ally of an enemy comes within the purview of this legislation". Again on page 94 he asserts: "It was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation". And finally, at the bottom of page 94 and top of page 95, he asserts: "The Alien Property Custodian not having the power under the statute to seize property belonging to an American corporation, *his acts of seizing the 14,900 shares and of seeking to sell them are nullities*".

The fallacy in his argument is evident. According to his argument, the Alien Property Custodian could capture *only* such enemy property as was OPENLY, AVOWEDLY AND CONFESSEDLY ENEMY PROPERTY. If the Alien Property Custodian can capture *only such* property, it is self-evident that the right expressly conferred upon Congress by the Constitution "to make rules for the capture of property on land and sea" will be seriously, if not fatally, crippled.

The Trading with the Enemy Act was not so limited. While it is true that Section 7(c) provides that "any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy", which "the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian", it is obvious upon a consideration of the entire *Act,* and in particular of Section 9, that the power of capture so conferred upon the President WAS NOT LIMITED TO OPENLY, AVOWEDLY AND CONFESSEDLY ENEMY PROPERTY.

The *Act* has elaborate provisions regarding CONFLICTING CLAIMS TO PROPERTY. Section 7(e) provides that "no person shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this *Act*". That subdivision also provides: "Any payment, conveyance, transfer, assignment or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same". Section 9 provides: "That any person, not an enemy or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian", may file with the Custodian a notice of claim; that the President may, "with the assent of the owner of said property and OF ALL PERSONS CLAIMING ANY RIGHT, TITLE OR INTEREST THEREIN, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian".

Section 9 further provides that "If the President shall not so order within sixty days after the filing of such application", the claimant shall have the right, in a suit in equity in a District Court, "to establish the interest, right, title or debt so claimed, and if the suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right or title is asserted or debt claimed, shall be retained in the custody of the Alien Property Custodian" until "any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment or delivery" * * * or "until final judgment or decree shall be entered against the claimant or suit otherwise terminated".

It is obvious from those and other portions of the *Act* that the President was expressly clothed with power to seize property which "after investigation" he should determine was enemy property, whether it was nominally in the possession or control of, or whether the legal or equi-

table title to such property was in, an enemy or a citizen or friendly alien.

The appellant's contention is that because property is *claimed* to be the property of a citizen or friendly alien, the right of capture does not exist. In Point V he argues that the true construction of the *Act* is that "it was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation".

But it does not follow that the act of the President "after investigation" in "determining" that the shares belonged to the Leipzig company, is without validity. Even assuming, as counsel for the appellant assumes, that the ownership of the shares was at the time of seizure vested in the New York company, either legally or equitably, the act of seizure thereof by the Alien Property Custodian was by no means "a mere nullity". The validity of the seizure by the Alien Property Custodian is, under the terms of the *Act*, by no means dependent upon the question whether it may or may not subsequently or ultimately be determined that the *res* is American owned. The validity of the seizure depends only upon the determination by the President, or by his delegated officer, "after investigation", that the property is owned by or held for, or on account of, or on behalf of, an enemy. That determination may be mistaken, but a mistake in such a determination does not invalidate the initial seizure or sequestration. A citizen, whether a person or a corporation, or a friendly alien, has his full remedy under Section 9, but until he obtains relief thereunder the seizure stands and is in all respects valid.

If the interpretation contended for by the appellant were the law, then the right of capture on land could easily be defeated. All that aliens in this country on the eve of war would need to do would be to make a nominal assignment, conveyance, transfer or delivery of their property or rights to a citizen or to a friendly alien, who would assert his "rights" in that property, and the United States would be powerless to capture or make use of the property except and until the final determination of judicial proceedings in a court of law. Such a nominal

assignment or transfer would be sufficient to paralyze and defeat the right of capture of property on land.

There is nothing in the *Act* to justify such an interpretation. On the contrary, the *Act* expressly gives the President power to determine enemy ownership "after investigation". And that power is not limited to property that is openly, avowedly and confessedly enemy property or to property only of which the legal title is openly in an enemy, but it relates to all property "owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy" (Section 7(c). No clearer language could be used to invest the President with power to seize property which he shall have determined "after investigation" to be in fact enemy property, no matter how or by whom or under what claim held, whether by an alien enemy, an American citizen, an American corporation, or a friendly alien.

POINT VIII

The appellant's argument in his Point X that under the Act as amended there is no power of sale in the Alien Property Custodian except of perishable property and for the purpose of preventing waste, is contrary to the plain provisions of the Act as amended

He quotes the provisions of Section 12 of the Act as originally passed (page 123). On the next page, 124, he quotes the amendment of Section 12 of March 28, 1918. Then follows a quotation from the decision of Judge Mayer in the case of *American Exchange National Bank* v. *Palmer* (*supra*), which has nothing to do with the question of construction discussed in his point X. He then argues that in view of the fact that the Alien Property Custodian "is merely vested with the powers of a 'common-law trustee', it is believed that no substantial change has been wrought by this amendment in the provisions as originally enacted in Section 12 of *The Trading with the Enemy Act*. The Alien Property Custodian merely receives the property seized for preservation and safeguarding".

In Section 12 of the *Act* as originally passed there was a power of sale or other disposition "when necessary to prevent waste and protect such property".

Section 12 as amended March 28, 1918, retained the provision that the Alien Property Custodian should be "vested with the powers of a common-law trustee" in respect of seized property, but contained the following new provision: "and in addition thereto, * * * shall have power to manage such property and do any act or thing in respect thereof OR MAKE ANY DISPOSITION THEREOF OR ANY PART THEREOF, BY SALE OR OTHERWISE". That amendment eliminated from the *Act* the limitation in Section 12 as originally enacted of sales "if and when necessary to prevent waste and protect such property".

To argue, as counsel thus does, in the face of those two perfectly plain sections, that the amendment of March 28, 1918 wrought "no substantial change" in the *Act*, is to argue in the face of the clearest possible language of the statute to the contrary.

But in spite of that he repeats his statement that "the power of disposition would necessarily be confined to the sale of perishable property and for the purpose of preventing waste" (page 126). And he further argues that it would be "a manifest incongruity" if the Alien Property Custodian were held to have the right to dispose of any property coming into his possession "irrespective of the necessity for such disposition in order to prevent waste and deterioration".

The rest of appellant's point X is taken up with references to the business of the Botany Mills, its prosperity, its surplus, its condition, its prospects, the probability of a treaty with Germany, all leading to the assertion that "there is, therefore, no reason for the sale of these shares of stock at this time".

The answer to those statements is that those are questions of executive discretion which were not at issue in this suit and which will not be reviewed by this Court, the power of sale in the Alien Property Custodian being beyond argument in the very plain words of the *Act*.

In addition to the foregoing considerations, the appellant has no standing in this case to raise that question. If the appellant succeeds in his contention that the title to the shares was in the New York company, there will be no sale. In that case it would not be necessary for him to argue that the proposed sale would violate the intent of the *Act*, for the obvious reason that there would be no sale at all. The filing of his notice of claim and the bringing of this suit stayed the sale pending the trial of the suit and this appeal.

If, however, this Court shall decide that the shares were at the time of their seizure the property of the Leipzig company, then the appellant cannot complain of their sale, whether such sale is in conformity with the true intent and meaning of the *Act* or not.

Hence the argument that the proposed sale would violate "the true intent and meaning" of the *Act* cannot in any sense be in point upon this appeal.

POINT IX

The argument in appellant's point VIII that the limitation of relief upon a sale of property to the proceeds received therefrom violates the due process clause of the Constitution, is not involved in the case at bar

The appellant contends that the provisions of the amendment of November 4, 1918 are unconstitutional. That amendment provided, among other things, that the sole relief and remedy of a person having a claim to money or property conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, "or required so to be, or seized by him, SHALL BE THAT PROVIDED BY THE TERMS OF THIS ACT", and in the event of sale "shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian".

The "remedy provided by the terms of this *Act*" referred to in the amendment of November 4, 1918, is that

contained in Section 9, under which the present suit is brought. The appellant fails to state that Section 9 provides that the power of sale given to the Alien Property Custodian by Section 12 is immediately and effectually stayed by the mere filing of a notice of claim, by a person who is a non-enemy, of title to or an interest in property or money seized by the Alien Property Custodian.

Such a claim was filed by the complainant in the present case. It is a complete answer to the appellant's entire argument in Point VIII to say that there can be no sale until the question of the title to the seized stock is adjudicated upon this appeal. If this Court should decide that the title in the shares was in the New York company then the shares will be returned to the New York company, and there will be no sale. The appellant would then have no standing to complain of the terms of a sale that would never take place.

If, on the other hand, this Court should decide that the shares were the property of the Leipzig company, then neither the New York company nor the complainant herein as the holder of a voting trust certificate representing stock in the New York company would have any standing to complain either of the fact of the sale, the terms thereof, or the disposition of the proceeds.

We have shown that even if Congress in passing the *Act* and the amendments thereto had been bound by the restrictions of the Fifth and Sixth amendments, which it was not and is not, Sections 9 and 12 as amended provide for the due process of the law in the fullest sense of the word. The only person who could be aggrieved by the provision in the amendment of November 4, 1918, limiting the right of a claimant, in the case of sale, to the proceeds of the sale, would be an American or other non-enemy claimant. Such a person can obtain a complete judicial determination of his claim under the provisions of Section 9. Pending such a determination he can prevent any sale of the property claimed by him merely by filing a notice of claim as provided in the *Act*.

How completely and effectually the rights of American citizens and friendly aliens are protected under the provi-

sions of Section 9 is shown by the claim of the appellant under Section 9 and the present suit thereon.

The shares which are the subject of the suit were seized by the Alien Property Custodian on April 5, 1918. They were advertised by him for sale on December 2, 1918. They have not been sold and are still, after a period of more than two years, held by him subject to the judicial determination of the rights claimed therein by the appellant on behalf of the corporation in which he claims to be a stockholder. During that period the appellant has had a trial of his claim in the District Court and is now heard on appeal to this Court. Not until this Court has determined that the appellant's claim is unfounded in law and in fact may the shares be sold.

No more complete demonstration could be had of the ample protection afforded by the Act, and in particular by Section 9, of the rights of American citizens and of friendly aliens in and to property seized by the Custodian thereunder.

This case does not present the question stated in Point VIII (page 105) of appellant's brief of property in fact belonging to a citizen who either did not know of its seizure and hence made no claim to it, or stood by and allowed it to be seized and sold, being remitted to the proceeds only. THAT IS A QUESTION WHICH THIS COURT WILL ONLY PASS UPON WHEN IT IS INVOLVED IN A CAUSE PROPERLY BROUGHT BEFORE THE COURT.

At the risk of repetition, we feel compelled to state that in his Point VIII (page 105) counsel for the plaintiff repeats his statement, made elsewhere in his brief, that the Fifth Amendment to the Constitution of the United States "controls the exercise of the war power." The exact contrary was held by this Court in *Miller v. United States* (*supra*).

This Court, of course, will pay no attention to the insinuations, quite without foundation in fact, as to "limited competition" upon a sale of the shares, and as to the price that may be realized for the shares "being greatly less than their real value" (appellants' brief, page 104).

POINT X.

The questions of public policy as to the enactment and the scope of the Act, and the exercise of the discretion committed by the Act to the President, and under the Act by the President to the Alien Property Custodian, will not be reviewed by this Court

At various places in his brief (point V, top of page 90, at page 94 and again at page 41) counsel for the appellant argued that "there was nothing in our jurisprudence which contemplated that those shares of stock on the outbreak of war should be seized by the government". At that point he quoted three solid pages from the opinion of Chief Justice Marshall in *Brown* v. *United States*. Again, (in point VIII, page 104) he discussed questions of public policy and executive discretion, as to the time and terms of sale, such as to whether the property should be sold in bulk, as to the exclusion of aliens as bidders, as to the alleged lack of competitors in the bidding, and other questions of executive discretion and public policy pure and simple.

The answer to all of those arguments is that:

The policy of Congress in the respects referred to by counsel for the appellant will not be reviewed in this Court.

The questions of public policy passed upon and decided by Congress in passing the *Act* in the exercise of the war powers conferred upon Congress by the Constitution, the questions of public policy in the exercise by the President of the discretions conferred upon him by the *Act*, and the questions of policy and discretion passed upon by the Alien Property Custodian under the authority of the *Act* and under the proclamations and executive orders of the President, all present questions of public policy that will not be reviewed or made the basis of a decision by the Court in this cause.

Whether in the event of war the government of this country shall absolutely confiscate enemy property wherever found, whether it will merely hold such property in custody *in specie* until the end of the war, whether it will seize such property and sell the same, or a part thereof, and employ in the war or hold the proceeds and the unsold property until the end of the war, or whether it will make any seizure of any kind, are all questions to be determined by Congress, and its decision is final.

There can be no doubt of the power of Congress to make *absolute confiscation* and *a fortiori* to take any measures short of confiscation. This was settled in the case of *Brown* v. *United States*, 8 Cranch., 110, and has been repeatedly affirmed by this Court. In the *Brown case* this Court said, at page 121:

> "Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will."

This doctrine was reaffirmed in the *Miller case* (*supra*).

POINT XI

The contention in point IX of appellant's brief that because the President PERSONALLY did not make the adjudication of the enemy ownership of the shares, the act of the Alien Property Custodian in seizing the shares was without jurisdiction and void, is unsound

Plaintiff's point IX again presents a question of the construction of the statute. He does not claim that the President did not *in fact* and *in terms* vest in the Alien Property Custodian the powers conferred upon him by Section 7(c). The President did that by various executive orders. Among the executive orders so vesting such powers was the executive order of October 12, 1917, paragraphs XXIX and XXXIII, which are printed in appellant's point IX, pages 111-112; and also by the executive order of February 26, 1918, quoted at pages 112-113 of the appellant's brief, and which need not be repeated here.

He raises no question as to the interpretation of the President's executive orders or their meaning or effect. But he asserts that the President could not under the *Act* delegate to the Alien Property Custodian the power to make *any* determination as to enemy ownership of property provided in Section 7(c).

His argument has two branches. The first is that Congress did not *in fact* provide for the delegation of that power by the President (page 120). The second is that the determination under Section 7(c) is a judicial act (page 118), and hence that Congress *could not* provide that the President could delegate such power (page 114).

Section 5(a) of the *Act* provides in *express terms* that the President "may make such rules and regulations not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; AND THE PRESIDENT MAY EXERCISE ANY POWER OR AUTHORITY CONFERRED BY

THIS ACT THROUGH SUCH OFFICER OR OFFICERS AS HE SHALL DIRECT".

Notwithstanding that clear and comprehensive provision counsel for the appellant argues (page 120) that "this is not a grant of power to the President to delegate his functions".

He quotes the provisions of Section 7(c) (pages 109-110), the provisions of Section 9 as amended July 11, 1919 and various executive orders (pages 111-113). But he could have gone through the *Act* as amended and have pointed out hundreds of things or powers or discretions that were conferred upon the President by the *Act*. If the President may not "exercise any power conferred by this Act through such officer or officers as he shall direct", then every power, every discretion, every determination committed to the President by the *Act must be exercised by the President personally.*

Such a construction of the *Act* would be an absurdity. It would make the exercise of the war power of capture of enemy property on land abortive. To say that Congress intended to require that the President, who is the commander-in-chief of the army and navy of the United States, should do all the things, make all the determinations, exercise all the discretions, grant and revoke all the licenses, make all the investigations and do all the other things contemplated by the *Act*, is putting a construction on the *Act* which is absurd on the face of it. When Congress provided that the President "may exercise *any* power" conferred by the *Act* "through such officer or officers as he shall direct", it meant ANY and ALL such power. It did not mean that the President might delegate to the Alien Property Custodian power to seize and take possession of property but could not delegate power to investigate title to property.

He argues (page 122) that if the Alien Property Custodian had the power to make the determination provided by the *Act* and also to seize the property, he would thus be made "not only the investigator and the judge but also the executioner", and "that such a situation would be contrary

to the first elements of propriety and justice". If that argument is sound, then it would apply to the President acting under the *Act* with more force than to the Alien Property Custodian.

Section 7(c) provides that if (a) the President "after investigation, shall determine" that the property is enemy-owned, (b) the President shall require the property to be turned over to the Alien Property Custodian. The same Section 7(c) also *in terms* empowers the President "to make investigation", and also *to require* that the property shall be turned over to the Alien Property Custodian.

According to the argument of counsel for the appellant, the President would, if he exercised both of the powers of Section 7(c), be "not only the investigator and the judge but also the executioner", and the Alien Property Custodian would be only the custodian of the property directed by the President to be turned over to him.

According to the argument of counsel for the appellant, the President would be compelled to make not merely (a) the investigation but also (b) the direction to turn the property over and (c) he apparently would have to sign the writ addressed to the holder of the property commanding him to turn over the property to the Custodian. The Custodian would apparently, upon the appellant's theory, be a mere passive recipient of the property. Such a construction of the *Act* is a palpable absurdity.

The reference made by counsel for the appellant to the Alien Property Custodian or the President being the "investigator and the judge and also the executioner" is not a candid statement of the intent of Congress. As this Court has pointed out again and again (in *Miller* v. *United States* and other cases) the seizure of enemy or alleged enemy property is not a criminal proceeding, but is an exercise of the war powers of Congress. Therefore arguments from the criminal law have no application.

In support of his argument (page 120) that Section 5(a) "is not a grant of power to the President to delegate his functions", counsel for the appellant argues that "it is *his exercise* of power or authority to which reference

is made. Upon *him* rests the responsibility for any action taken. *He* is merely permitted to call into requisition *to enable him to exercise his* power and authority such officer or officers as *he* shall direct. It is *he* who acts 'through such officer or officers'. But nevertheless it is *he who is to act*".

If those words mean anything they mean that the President *must* exercise *all* of the powers and that in exercising his powers he is permitted only "to call into requisition" such "officer or officers as he shall direct" *to assist him.* It means, if it means anything, that not only must all of the powers be exercised in the President's name, but that the initiative as well as the final determination and seizure, the sale and all the subsequent and connected acts, must come from the President, must be done in his name, must be done by him with the assistance merely of such "officer or officers as he shall direct". Such a construction of the Act is an absurdity.

Congress has given the power to the President to delegate "ANY power conferred by the *Act*" upon him to "such officer or officers as he shall direct". That includes the power to make the investigation under Section 7(c).

This leads to the second part of the appellant's argument, namely, that even if Congress had intended that the President should have the power to delegate his powers under the *Act,* Congress could not legally so provide.

His statements under this point are very confused and confusing.

He does not argue that it would be unconstitutional for Congress *expressly* to provide that the President's power of investigation and determination could be delegated. No constitutional question is raised by him in point IX. Yet he says that "the *nature* of the duties" imposed upon the President is such that *"they cannot be delegated"* (page 114). By that he may mean that the nature of the duties *imposed by the Act itself* upon the President is such that they cannot be delegated. But that does not present a question of statutory construction nor of constitutional law, but a difference of opinion between

counsel for the appellant and Congress as to what powers the President is to exercise personally and what powers he may delegate.

The same vagueness characterizes his next sentence, "functions expressly imposed upon him *cannot be performed by another*". The answer is that Congress thought otherwise and so provided. Or arguing thus, he may mean that Congress *could not* provide that the President should delegate his powers. If Congress cannot so provide, then it must be because the constitution forbids. That he does not claim.

Before he reaches the assertion in his brief (page 120) that Congress *in fact* did not provide for a delegation of authority, he argues that investigation and determination is "a *judicial* act" and hence that it is a function that "*cannot be delegated*".

His argument there is that the determination contemplated by the Act "necessarily calls for the exercise of the *judicial faculty*", and that "to make such a determination after an investigation shows clearly that the Act is not ministerial *but judicial*" (page 118).

His chief reliance for that contention seems to be the case of *Runkle v. United States*, 122 U. S. 543. There the statute imposed upon the President the judicial function of affirming or disapproving sentences of a general court martial. This Court held that that was a judicial function which the Statute did not provide could be delegated. Appellant quotes at length from the opinion of the Court, but he omits the following passage from that opinion, which clearly points out the distinction between that case and the case at bar:

> "Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. THE WHOLE PROCEEDING FROM ITS INCEPTION IS JUDICIAL. The trial, finding, and sentence are the solemn acts of a Court organized and conducted under the authority of and according to the prescribed forms of law. IT SITS TO PASS UPON THE

MOST SACRED QUESTIONS OF HUMAN RIGHTS THAT ARE EVER PLACED ON TRIAL IN A COURT OF JUSTICE; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. WHEN THE PRESIDENT, THEN, PERFORMS THIS DUTY OF APPROVING THE SENTENCE OF A COURT-MARTIAL DISMISSING AN OFFICER, HIS ACT HAS ALL THE SOLEMNITY AND SIGNIFICANCE OF THE JUDGMENT OF A COURT OF LAW."

The determination of the enemy character of property, which the President under the Act is authorized to make, is not in the proper sense of the word a "judicial proceeding".

In various parts of his brief counsel for the appellant argues that the Act is unconstitutional because property is seized without a judicial proceeding. But in Point IX of his brief he argues that the determination is "a judicial act and involves a judicial proceeding".

It is a far cry from a judicial proceeding in which, to use the language of this Court in the *Runkle* case, "the most sacred questions of human rights" are passed upon and an investigation and determination in the exercise of the war power of the enemy character of rights and property.

The only decided case under the present Act where the argument of counsel for the appellant in his Point IX was made and discussed was the case of *Kahn v. Garvan*, 263 Fed. Rep. 909, 916. But in that very case, *Runkle v. United States* was cited by the Court as authority for the proposition that the duty imposed upon the President by Section 7(c) of the Act was executive and not judicial.

Counsel for the appellant quotes from the opinion in the *Runkle* case further as follows:

> "There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts."

But in making that quotation he omits the very next sentence in that paragraph, which reads as follows:

> "That has been many times decided by this Court. *Wilcox v. Jackson,* 13 Pet. 498, 513; *United States v. Eliason,* 16 Pet. 291, 302; *Confiscation Cases,* 20 Wall. 92, 109; *United States v. Farden,* 99 U. S. 10, 19; *Wolsey v. Chapman,* 101 U. S. 755, 769."

Among the foregoing cases cited by this Court in the *Runkle case* is one case which is practically conclusive against the contention of counsel for the appellant under this point. That is the *Confiscation Cases,* 20 Wall. 92, 109. In that case the act of July 17, 1862, entitled: "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate property of rebels and for other purposes", provided that *"It shall be the duty of the President of the United States to cause the seizure"* of the property of persons named in the said act and to apply and use the same and the proceeds thereof for the support of the army of the United States.

The act also provided that to secure the condemnation and sale of any such property, after the same should have been seized, so that it may be made available for the purposes aforesaid, proceedings *in rem* should be instituted in the name of the United States in the United States Courts, which proceeding should conform, as nearly as might be, to proceedings in admiralty or revenue cases.

Under the *Act,* the United States filed a libel of information for the condemnation of certain real property.

One of the averments of the information was that the real property had been seized by the marshal in compliance with written instructions issued by the Attorney General of the United States to the District Attorney of the district in which the action was brought by virtue of an Act of July 1862.

It was contended that the Court had no jurisdiction, even if the seizure alleged in the information was made, BECAUSE IT WAS NOT MADE BY ORDER OF THE PRESIDENT OF THE UNITED STATES. It was held that the contention was not well founded and that the direction given by the Attorney General must be regarded as a direction given by the President.

That case is almost identical with the case at bar. Under the Act of July, 1862, there was, as in the present *Act*, an initial seizure prior to judicial determination. That seizure necessarily implied a determination that the property seized was the property of one of the persons named in the *Act*. That determination is analogous to the same determination which is required under *The Trading with the Enemy Act* to be made by the President. The *Confiscation Cases*, therefore, are absolute authority for the right of the President to delegate the power conferred upon him by section 7(c) of the *Act*.

Both the Act of July 1862 and the present *Act* provide for an initial sequestration and a subsequent judicial determination of ownership. The difference between the two is that under the Act of July 1862 the initiative in bringing the proceeding to determine the title of the property was upon the government, whereas under the present *Act* such initiative is upon the claimant. But in both cases there was to be an initial sequestration of the property. Such sequestration was obviously an executive and administrative act, and was so held in the *Confiscation Cases* (*supra*).

The arguments of counsel for the appellant are not novel. The claim has frequently been made that certain administrative acts involve the exercise of a judicial power and hence they cannot be delegated to administrative officers.

One of the latest of the decisions of this Court on that subject was in the *Selective Draft Cases*, 245 United States 366, 389 (1917) where it was argued that the Act was void as a delegation of federal power to state officers and also that the statute was void because it vested administrative officers with legislative discretion and also that THE ACT WAS VOID BECAUSE OF AN ALLEGED "CONFERRING OF JUDICIAL POWER". The Chief Justice of this Court disposed of those arguments briefly and conclusively as follows:

> "It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the Act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416. A LIKE CONCLUSION ALSO ADVERSELY DISPOSES OF A SIMILAR CLAIM CONCERNING THE CONFERRING OF JUDICIAL POWER. *Buttfield* v. *Stranahan*, 192 U. S. 470, 497; *West* v. *Hitchcock*, 205 U. S. 80; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 338-340; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275".

POINT XII

The contention of the appellant that the Alien Property Custodian precluded himself from seizing the 14,900 shares because he had seized the rights of the Leipzig company under the contract, is unfounded in fact and unsound in law

This is argued under appellant's point XII (pages 130-131). Appellant's point XII reads: "The Alien Property Custodian having elected to seize the cause of action of the Leipzig company against the New York company for the unpaid purchase price for the 14,900 shares of the Botany Worsted Mills (defendants' Ex. L-1, rec. p. 271), he thereby precluded himself because of the election made to seize the 14,900 shares of stock transferred to the New York company, his election to recognize the transaction as a sale being inconsistent with the position taken by him in the present case."

Whether intentionally or not, the foregoing is misleading, for it implies that the demand by the Alien Property Custodian for the rights of the Leipzig company *under* the contract *preceded* his seizure of the shares. THE VERY CONTRARY IS THE FACT. In view of the misstatement contained in appellant's point XII, it is well to state the dates of the two seizures.

The Alien Property Custodian seized the 14,900 shares on April 5, 1918 (defendants' Exhibit 9, pages 202-205; folios 380-382).

Nearly a year later, on March 13, 1919, he demanded the rights, privileges and benefits of the Leipzig company *under* the contract (defendants' Exhibit L-1, pages 271-272; folios 478-480).

But not only does he misstate the order in which those seizures were made, representing that the seizure of the rights of the Leipzig company under the contract preceded the seizure of the shares, but he goes on to say that "the appellees are thus seeking to blow hot and cold at the same

time". That, too, is a misrepresentation of fact, for the demand of the rights of the Leipzig company under the contract, made March 13, 1919, contained an express provision that it "SHALL NOT PREJUDICE OR AFFECT ANY DEMAND HERETOFORE * * * MADE WITH RESPECT TO SAID 14,900 SHARES, OR ANY RIGHTS, PRIVILEGES OR BENEFITS ACQUIRED BY VIRTUE THEREOF".

The fallacy in the appellant's argument is brought out by the fact that the first seizure was of the shares, April 5, 1918. Next followed the demand of the rights of the Leipzig company under the contract, March 13, 1919, but that demand was expressly subject to "all rights, privileges or benefits" acquired by the Alien Property Custodian under his seizure of the shares a year previous, April 5, 1918.

He then (page 130) argues that the "effect of this dual and inconsistent attitude is to deprive the New York company of the ability to use the shares of stock for the purpose of financing their payment". It is difficult to be patient with such an assertion. He coolly ignores the fact that the shares were not in this country for years before the contract, or at the time of the making of the contract, or since, and therefore that even if there had been no seizure of any kind the New York company could not "use the shares of stock for the purpose of financing their payment".

Furthermore, there could not have been legally any payment during the war, and hence the seizure of the shares during the war did not prevent the New York company from "using the shares for the purpose of financing their payment".

The theory of election does not have any application to either the facts of this case or the rights of the Alien Property Custodian. The doctrine of election has no relation to the determination and seizure by the Alien Property Custodian.

The rule is well stated in 15 *Cyc*, 252, as follows:

> "Election of remedies has been defined to be the right to use or the act of using up different actions or remedies, where plaintiff has suffered one species

of wrong from the act complained of. And broadly speaking, an election of remedies is the choice by a party to an action of one or more coexisting remedial rights where several such rights arise out of the same facts; but the term has been generally limited to a choice by a party between inconsistent and remedial rights".

Other definitions are:

"The right of selecting one of several forms of action for the redress of injury or enforcement of a right".—*English Law Dictionary.*

"The choice between two or more coexisting and inconsistent remedies for the same wrong".—*Cyclopaedia Law Dictionary.*

With regard to the necessity of election it has been said that:

"In order that election must be made, the party must have at his command different coexisting remedial rights, which are inconsistent, and not analogous, consistent and concurrent".—15 *Cyc,* 257.

It might be a sufficient answer to the suggestion that the Alien Property Custodian has made an election which he was compelled to make, that he was not a "plaintiff" seeking a "remedy". In other words, the doctrine of election is a technical doctrine *relating to a plaintiff seeking a remedy in a court of law.*

But even upon the rules laid down for plaintiffs seeking a remedy, the claims of the Alien Property Custodian to title to the shares *in disaffirmance of* the contract and in *claiming under it are not inconsistent.* It has been held that actions which proceed upon the theory that the title to property remains in the plaintiff are naturally inconsistent with those which proceed upon the theory that *title has passed to the defendant.* But there is no inconsistency

between different legal remedial rights *all* of which are based upon the denial of the claim of title to property in the plaintiff and all of which are based upon the affirmance of title in the defendant.

In *re Garver*, 176 N. Y., 386, it was held that the commencement of an action by a judgment creditor to set aside an assignment for the benefit of creditors on the ground of fraud did not constitute an election by him to take in hostility to the assignment within the doctrine of election of remedies, and that although he was successful as to a portion of the property transferred to the assignee, if the judgment resulted in no benefit to him he might take under the assignment notwithstanding his attack upon it, and the judgment constituted no bar to such relief.

On the other hand, it was held in *Taussig* v. *Hart*, 49 N. Y., 301, that where a stock broker, without authority, transferred to himself stock of a customer in his hands for sale, and sold at an advance, the customer cannot charge the broker either as purchaser or as guilty of conversion and at the same time treat the stock as sold, and cannot ask for an accounting.

In the case at bar, the Alien Property Custodian investigated and determined that the ownership in the 14,900 shares was in the Leipzig company on April 5, 1918.

He accordingly seized the shares. The title vested in him upon that seizure. On March 13, 1919, he seized the rights, privileges and benefits of the Leipzig company under the contract (defendants' exhibit L-1, pages 271-272; folios 478-480). But in that seizure and demand of March 13, 1919, it was expressly stated that it "shall not prejudice or affect any demands heretofore * * * made with respect to said 14,900 shares or any rights, privileges or benefits acquired by virtue thereof".

It cannot seriously be disputed that the Alien Property Custodian has *all possible rights* of the Leipzig corporation. The fact is that the Alien Property Custodian *has* the rights of the Leipzig company "both ways".

Federal equity rule 30 provides: "The answer may state as many defenses, *in the alternative, regardless of consistency, as the defendant deems essential to his de-*

fense." Under that rule the defendant is not put to an election as to his defenses. But even if he were put to an election, there can be no inconsistency within the meaning of the doctrine of election where the claim of the defendant is a claim of title. Defendant is entitled to prove title to property in dispute on any theory available.

CONCLUSION

The judgment of the District Court dismissing the original and supplemental bills of complaint on the merits, with costs, should be affirmed

Respectfully submitted

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